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COMMENT

Crafting a Challenge to the Practice of Drug Testing Welfare Recipients: Federal Welfare Reform and State Response as the Most Recent Chapter in the War on Drugs

CORINNE A. CAREY†

Autonomy is the death knell of authority, and authority knows it: hence the ceaseless warfare of authority against the exercise, both real and symbolic, of autonomy—that is, against suicide, against masturbation, against self-medication . . .¹

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.²

INTRODUCTION

A cacophony of state voices responded to the opportunity quietly granted by Congress in its passage of welfare reform leg-

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1. THOMAS SZASZ, CEREMONIAL CHEMISTRY: THE RITUAL PERSECUTION OF DRUGS, ADDICTS, AND PUSHERS 175 (1974).

2. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

islation,³ in August of 1996, by proposing a wide array of plans to identify and sanction current and former drug users who apply for or who currently receive public assistance benefits.⁴ Section 902 of Title 9 of the Personal Responsibility and Work Opportunities Reconciliation Act of 1996 (PRA) bestows a negative grant of power on the states, allowing them to begin drug testing welfare recipients and sanctioning those who test positive. Section 902 provides that "[s]tates shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances."⁵ A mere sentence contained in this mammoth⁶ and historic⁷ legislation provides states with a powerful weapon in their war on drugs.

This Comment will provide a detailed analysis of state responses to the two provisions of Federal Welfare Reform which directly affect current and former drug users and suggest a litigation strategy for challenging plans which seek to identify and sanction drug users. I argue that random, suspicionless drug testing of a class of indigents contravenes the Fourth Amendment's proscription of unreasonable searches and seizures⁸ and

3. Personal Responsibility and Work Opportunities Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (to be codified in scattered sections of U.S.C.) [hereinafter PRA]. The PRA was passed by the House on July 31, 1996 by a vote of 328-101 with Democrats almost evenly divided. The PRA was passed by the Senate on August 1, 1996 by a vote of 78-21—with all 53 Republicans voting for it, and Democrats divided 25-21. President Clinton signed the PRA into law on August 22, 1996.

4. Several states incorporated mandatory drug testing of welfare recipients into their welfare reform plans prior to the passage of the PRA. These plans were approved state-by-state via waiver. See *infra* note 70 and accompanying text. States have since approved a wide variety of drug testing schemes in response, and have chosen to identify drug users in a number of ways, from requiring that applicants and recipients state that they are drug free, to utilizing urinalysis. See *infra* Part II & Appendix I (detailing individual state responses). Reports on the accuracy of laboratory drug testing (testing of blood, urine, sweat, or hair specimens) range from 25% to 97%. See *infra* note 121. For a general overview of the mechanics of laboratory drug testing, see Karen Manfield, Comment, *Imposing Liability on Drug Testing Laboratories for "False Positives": Getting Around Privity*, 64 U. CHI. L. REV. 287, 290-92 (1997).

5. PRA, tit. IX, § 902.

6. The Act, in its final form, spans over three hundred pages.

7. See Robert Pear, *Senate Passes Welfare Measure, Sending it for Clinton's Signature*, N.Y. TIMES, Aug. 2, 1996, at A1 (noting that the "welfare [reform] bill would reverse six decades of social policy, eliminating the Federal guarantee of cash assistance for the nation's poorest children"). The new law "will end the 60-year-old guarantee of cash assistance to the poor." Editorial, *Welfare ill-reformed*, ST. PETERSBURG TIMES, Aug. 2, 1996, at 14A.

8. U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affir-

the due process clause and the equal protection guarantees of the Fourteenth Amendment.⁹ I also contend that even well-crafted state plans designed to steer clear of constitutional violations fail to do so, and additionally contravene the Americans with Disabilities Act and state constitution provisions.¹⁰ I conclude by maintaining that increasingly punitive measures levied against welfare recipients in the war on drugs is neither legally sound, nor wise or just public policy.¹¹

Get tough policies aimed at welfare recipients suspected of using drugs reflect a growing antipathy expressed by mainstream public opinion toward drug users,¹² and drug users receiving public assistance in particular.¹³ A 1989 Washington

mation, and particularly describing the place to be searched, and the persons or thing to be seized."

9. U.S. CONST. amend. XIV, § 1 reads, in relevant part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the law." For a preliminary statement addressing drug testing welfare recipients when it was a mere proposal, see Laura W. Murphy, Director, American Civil Liberties Union Washington National Office, *ACLU Calls Proposal to Drug Test Welfare Recipients a "False Positive,"* May 22, 1996, <<http://www.aclu.org/news/n052296.html>> (on file with the *Buffalo Law Review*).

10. See *infra* Part III.A & III.D.

11. With one major thrust of welfare reform in this country being reduction in the cost of public assistance programs and moving people "from welfare to work," a program that will have negligible concrete benefits and is estimated to cost over \$25 million a year in New York State alone. While estimates vary, the figure \$25 million a year is based on multiplying the state's existing welfare population of 1.2 million by \$18 per test, and adding \$3.4 million to cover new applicants, administration, and confirmatory tests. Confirmatory tests cost about \$25 a piece. See Murphy, *supra* note 9.

The Legal Action Center compiled research on the costs of drug testing: \$65 a test in one government-certified lab in Philadelphia (\$35 a test with a large-volume discount); \$42-\$76 a test in New York; \$73.46 a test for drug testing federal employees. See LEGAL ACTION CENTER REPORT, MAKING WELFARE REFORM WORK: TOOLS FOR CONFRONTING ALCOHOL AND DRUG PROBLEMS AMONG WELFARE RECIPIENTS 45 (1997) [hereinafter MAKING WELFARE REFORM WORK] (citing U.S. General Accounting Office, *Employee Drug Testing: Estimated Cost to Test All Executive Branch Employees and New Hires* (June 1992); American Management Association, 1996 AMA Survey—Workplace Drug Testing and Drug Abuse Policies, Summary of Key Findings (1996)). The quotes compiled do not contemplate administrative costs or the costs of litigation arising from due process challenges.

12. A look at recent legislative proposals dealing with drug crimes is one illustration of this antipathy. A Mississippi bill would make "trafficking in cocaine that leads to a natural, though not inevitable, lethal result" a capital offense." Note, *Recent Legislation: Welfare Reform—Punishment of Drug Offenders*, 110 HARV. L. REV. 983, 983 & n.3 (1997) [hereinafter *Punishment of Drug Offenders*] (quoting H.B. 1013, Reg. Sess. (Miss. 1996)). A variety of other proposed punishments for drug offenders include "flogging and 'cutting off a finger for each drug conviction.'" *Id.* (quoting DOUGLAS N. HUSAK, DRUGS AND RIGHTS 13 (1992)).

13. Louisiana drug consultant Bruce Wilkinson, commenting on his state's tough new law, see *infra* note 91 and accompanying text, and Appendix I, nn.15-16, recently

Post/ABC News poll showed that fifty-five percent of those surveyed favored mandatory drug testing of *all people*, and sixty-seven percent favored drug testing for high school students.¹⁴ Almost half of all Fortune 500 companies currently have drug testing procedures in place to screen job applicants for drug use,¹⁵ and 89% of major American companies administer drug tests to all new hires.¹⁶ The desire to identify drug users has turned into a burgeoning business,¹⁷ with scores of drug testing companies offering their services to private employers,¹⁸ school administrators, and parents.¹⁹

stated: "I do feel the public is . . . in a mood to say if I'm going to work hard in the middle class and give my money over more and more taxes for welfare [sic] . . . what are you going to do to show me my money isn't going for drugs?" *Random Drug Testing in Louisiana* (CNN Today television broadcast, Nov. 18, 1997) available in LEXIS, News File, Transcript No. 97111804V13.

14. Philippa M. Guthrie, *Drug Testing and Welfare: Taking the Drug War to Unconstitutional Limits?* 66 IND. L.J. 579, 580 (1991) (citing Tom Wicker, *Rights vs. Testing*, N.Y. TIMES, Nov. 28, 1989, at A25). Additionally, a 1989 poll showed that "52% of those surveyed were willing to have their homes searched [and] 67% were willing to have their cars stopped and searched without a warrant." *Id.*

15. Michael Doyle, *Drug Testing Habit Grows*, SACRAMENTO BEE, Feb. 9, 1997, at E1 (citing Bureau of Labor Statistics which found that by 1991 40% of all Fortune 500 Companies tested job applicants). Ninety-eight percent of all Fortune 200 companies drug test their employees. David W. Lockard, *Protecting Medical Laboratories from Tort Liability for Drug Testing*, 17 J. LEGAL MED. 427, 427 (1996).

16. Yoji Cole, *Hi-Tech Drug Test Adhesive Patch Ushers in a New Era of Drug Testing*, L.A. WEEKLY, Nov. 29, 1996 at 12. See also Lockard, *supra* note 15, at 427 (stating that 78% of employers conduct some sort of drug testing).

17. See *Santiago v. Greyhound Lines, Inc.*, 956 F. Supp. 144, 150 (N.D.N.Y. 1997) (noting that "commercial laboratories earned a third of a billion dollars in testing revenue as early as 1990") (citing Mark A. Rothstein, *Workplace Drug Testing: A Case Study in the Misapplication of Technology*, 5 HARV. J.L. & TECH. 65, 81 (1991)).

18. The National Association of Collection Sites (NACS), a trade association providing information to employers about drug testing issues "was founded in September 1995 as the industry trade association for sites performing drug and alcohol testing specimen collections. Since its founding two years ago, NACS has grown to over 1700 members nationwide." *National Association of Collection Sites*, Oct. 27, 1997, <<http://www.collection-sites.org>> (on file with the *Buffalo Law Review*).

19. A company called Drug Alert offers "A Use-at-Home Drug Detection and Identification Kit for Concerned Parents":

a drug detection and identification kit based on the same proven technology employed by law enforcement agencies worldwide. It detects microscopic amounts of Cocaine, Crack Cocaine, Heroin, Methamphetamine, Marijuana, LSD, and PCP. [T]he kit contains a three-inch pre-moistened sample collector which gathers minute—and usually invisible—drug traces when you wipe it across desktops, telephones, books, door knobs, or other items . . . you can easily collect the traces that are virtually always present when someone is using illegal drugs. The traces are analyzed and identified at Barringer's laboratories. They can provide the information you need to address a potentially very serious problems . . . your kit is sent to you in a discreet envelope which con-

Part I of this Comment demonstrates how the rhetoric and hysteria of the war against drugs have propelled attempts to curtail the civil liberties of drug users in the war on drugs at the federal level, both prior to and following the passage of the PRA. Part II identifies state plans which raise significant constitutional issues. Part III suggests a litigation strategy for challenging state efforts to institute mandatory, suspicionless drug testing, either by specific welfare reform legislation or by discretion of individual state departments of social services, of a class of indigents.²⁰

I. BACKGROUND

A. *The Genesis of the War on Drugs*

In his comprehensive look at historical restrictions on civil rights during times of war, Paul Finkelman observes that while there is "no clear beginning to the war on drugs," the term "war on drugs" was first used during the Nixon Administration.²¹ The

tains everything you need for a scientifically accurate test The results—positive or negative—will be available in two weeks. If you wish to remain anonymous, you may return the envelope with only the ID number supplied. You can then telephone in for the results using only the ID number
PRICE: \$35.00 EACH.

Drug Alert!, Oct. 26, 1997, <<http://www.gdi.net/fohg/athome.htm>> (on file with the *Buffalo Law Review*).

20. See generally Guthrie, *supra* note 14. Written before any concrete proposals for drug testing welfare recipients were introduced, Guthrie lays the groundwork for the constitutional analysis presented here. See also PAULA GABER, *DRUG TESTING OF AFDC RECIPIENTS* (1996).

21. Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1396 (1993). See also Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 589-90 (1995) (arguing that the rhetoric of the drug war has been used to justify the curtailment of civil liberties). The roots of the war on drugs stem from the passage of the Harrison Act in 1914, which was intended to medicalize heroin and cocaine, which had not until then been criminalized. The Supreme Court first used the Harrison Act to impose criminal penalties for prescribing such drugs to addicts in *Webb v. United States*, 249 U.S. 96 (1919). See John C. McWilliams, *The History of Drug Control Policies in the United States*, in *Handbook of Drug Control in the United States* 29 (James A. Inciardi ed., 1990) [hereinafter *HANDBOOK OF DRUG CONTROL*]. McWilliams explains that in an attempt to assess the efficacy of the Act, the Secretary of the Treasury formed a committee to investigate drug use post-Harrison. He writes:

[T]he committee's most dramatic finding was that the illicit use of narcotics had increased while the act had been in effect . . . [but] instead of more closely examining the weaknesses of the law . . . the committee simply stiffened the penalties as committees have done repeatedly and ineffectively ever since.

Id. at 32.

Anti-drug Abuse Act of 1988²² provided the foundation for federal policy and legislation in the war on drugs. An examination of the provisions of the Act, and the rhetoric of the Reagan and Bush Administrations, Congress, and the Office of National Drug Control Policy, is critical to understanding the federal government's war on drugs.²³ Referring to President Reagan's commitment to end the drug problem at all costs, Steven Wisotsky observed:

[L]egal scholars rarely pay much attention to Presidential rhetoric in analyzing legal developments. But, in this situation, it would be a serious mistake to disregard the tough talk and political posturing. Attitude, above all else, drives the counterrevolution in criminal law and procedure This attitude [ending the drug problem by any means] propels the trend toward creating a drug "exception" to the law: if conduct is literally unforgivable, then draconian measures are justified.²⁴

Just as Nancy Reagan's campaign to encourage children to "Just Say No" guided the efforts of schools, churches, and community children's programs during the Reagan administration,²⁵ George Bush's "zero tolerance" approach provided law enforcement, the courts, Congress, and the United States Sentencing Commission,²⁶ with direction in establishing policies, procedures,

22. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of U.S.C. (1988)) *repealed by* 21 U.S.C.A. §§ 1501-08 (West Supp. 1997). With this Act, President Ronald Reagan created the Office of National Drug Control Policy, which was charged with developing a comprehensive national strategy for combatting drugs.

23. See generally Diane M. Canova, *The National Drug Control Strategy: A Synopsis, in Handbook of Drug Control*, *supra* note 21, at 339 (providing a summary of the 1989 National Drug Control Strategy). See also Craig Reinerman & Harry G. Levine, *Punitive Prohibition in America*, in *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 321 (Craig Reinerman & Harry G. Levine eds., 1997) [hereinafter *CRACK IN AMERICA*]. Reinerman and Levine trace the roots of "zero tolerance" rhetoric to the ideological extremism of the punitive prohibitionists, exemplified by the 1926 book *Opium the Demon Flower*, which stated that: "Leadership in the nation-wide fight against addiction has thus been definitely taken by America's federal government. The problem henceforth is one of administration What is needed is more inspection; more inspectors; more certain and more severe punishment; more imprisonment" *Id.* at 325 (quoting GRAHAM-MULHALL, *OPIMUM THE DEMON FLOWER* 240-41 (1926)).

24. Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 891 (1987).

25. The "Just Say No" approach to drug control was adopted just as the Reagan administration "began its disengagement from the drug abuse treatment business." Duane McBride et al., *AIDS, IV Drug Use, and the Federal Agenda*, in *HANDBOOK OF DRUG CONTROL*, *supra* note 21, at 275. See also LYNN ZIMMER & JOHN P. MORGAN, *MARIJUANA MYTHS, MARIJUANA FACTS: A REVIEW OF THE SCIENTIFIC EVIDENCE* 143 (1997).

26. The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) established the United States Sentencing Commission, an independent

and laws which virtually eliminate consideration of the civil liberties of drug users. In 1989, Bush proclaimed that

[t]he policy of this Administration is "zero tolerance." No amount of drug use is acceptable. And, zero tolerance should be the policy of every state in the Union—of every county and town, of every school, business, and community group—in fact, of every American.²⁷

While many thought that the harshness of the war on drugs would abate with the election of President Clinton in 1992,²⁸ and many contend that it has,²⁹ Presidential rhetoric and pro-

agency in the judicial branch *whose members are appointed by the President*, to develop federal sentencing guidelines. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988), and 28 U.S.C. §§ 991-998 (1988)). *United States Sentencing Commission, Guidelines Manual*, Introduction (1996) [hereinafter USSG].

None of the members [of the original Commission] had extensive experience in sentencing offenders in a high-volume urban court . . . [t]here was no . . . federal defender or private attorney skilled in criminal representation and sentencing advocacy, and no federal probation officer who had analyzed a wide range of offender characteristics or devised punishment options to match offenders' risks or rehabilitative potential.

See also Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1741 (1992). The power of the Sentencing Guidelines goes beyond merely creating a uniform federal sentencing scheme. *Id.* The departure scheme constructed by the USSG, whereby a sentencer is authorized to take certain factors into consideration to justify either an upward or a downward departure to the mandated sentence, can be used to require a sentencer to rely on illegal evidence. *Id.* at 1739 (citing *United States v. Tejada*, 956 F.2d 1256 (2d Cir. 1992)). In *Tejada*, "the prosecutor . . . who had to drop firearm possession charges at trial because the evidence was illegally obtained, was still able to use the defendant's illegal gun possession to enhance the sentence for related drug charges." *Id.* at 1740. Freed argues that "[t]ogether, the *Tejada* decision and the guidelines' relevant conduct approach significantly reduce the disincentives for police and prosecutors to obtain illegal evidence." *Id.* (emphasis added). Guidelines relating to drug offenses and proportionate sentencing for specific amounts of controlled substances can be found in Part D "Offenses Involving Drugs," USSG, *supra*, §§ 2D1.1 - 2D3.2.

27. Guthrie, *supra* note 14, at 579 (quoting GEORGE BUSH, BUILDING A BETTER AMERICA, SUPPLEMENT TO THE MESSAGE DELIVERED TO THE JOINT SESSION OF THE CONGRESS 66 (Feb. 9, 1989)).

28. Early in his administration, Clinton "supported shifting the federal approach to drug use from punishment to drug treatment and rehabilitation" of those addicted to drugs, and proposed to launch a "multifaceted offensive" that [would include] 'more and better education, more treatment, more rehabilitation.'" Nancy E. Marion, *Symbolic Policies in Clinton's Crime Control Agenda*, 1 BUFF. CRIM. L. REV. 67, 72 & n.20 (1997) (quoting Clinton's Remarks on the Swearing-In of National Drug Control Policy Director Lee Brown, PUB. PAPERS OF THE PRESIDENT 967 (1993)).

29. Charles Rangel, a democratic member of the House of Representatives from Manhattan "accused Clinton of going AWOL in the drug war and pointedly said he miss[ed] Nancy Reagan's 'Just Say No' campaign." Thomas Galvin & Deborah Orin, *Teens' Drug Abuse: Dole Uses Shocking Report to Bash Bill*, N.Y. POST, Aug. 11, 1996, at

posals reveal that the drug war has increased in intensity. Comparing the rhetoric of President Reagan in 1986 to Clinton's recent remarks, Joshua Shenk, a correspondent for *The Economist*, contends that "the Clinton administration has taken the Republican drug war to soaring new heights of draconian ineffectiveness."³⁰ Shenk compared Reagan's views on key drug policy issues to Clinton's. While Reagan supported mandatory drug testing of safety-sensitive employees, for example, air traffic controllers and federal agents who carry guns, he preferred a voluntary program. Reagan also did not believe jailing drug users would solve the problem; he felt that treatment was the better solution. Additionally, Reagan believed executing drug dealers would be "counterproductive."³¹

In contrast, Clinton has proposed testing drivers license applicants,³² expanding the death penalty for drug dealers,³³ and drug testing federal parolees.³⁴ Furthermore, Clinton supports "longer mandatory prison sentences, broader interdiction efforts, more money for law enforcement,"³⁵ and mandatory drug testing of high school athletes.³⁶ In 1996 the Clinton administration rejected a recommendation from the United States Sentencing Commission to reduce or eliminate the disparity in mandatory sentencing laws which punish individuals who sell crack at

2.

30. Joshua Wolf Shenk, *The Drug War: Tougher Than Ever, Still a Bust*, INT'L HERALD TRIB., Oct. 31, 1996.

31. *Id.*

32. A \$2 million pilot program to drug test driver's license applicants is included in the proposed Reauthorization of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). Hon. Mortimer L. Downey, Deputy Secretary of Transportation, Prepared Statement Before the Senate Committee on Environment and Public Works, Subcommittee on Transportation and Infrastructure (Feb. 13, 1997), in FED. NEWS SERVICE, Feb. 13, 1997. See also Shenk, *supra* note 30; *Leaders of Each Party Say Congress Will be Theirs*, USA TODAY, Oct. 21, 1996, at 8A; John Aloysius Farrell, *Critics Hit Clinton Teen-Age Drug Testing Plan; Many See Proposal on Licenses as Invasion of Privacy*, BOSTON GLOBE, Oct. 23, 1996, at A17.

33. See Shenk, *supra* note 30. See also Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. VI, § 60013, 108 Stat. 1796.

34. See Burt Solomon, *Because of the Election, Parolees Face Testing for Drugs*, 28 NAT'L J. 2304 (1996). Clinton signed an Executive Order on Dec. 18, 1995, ordering drug testing of all federal prisoners. His new initiative focuses on conditioning grants for the building of new prisons on states' compliance with Clinton's plan to drug test federal parolees. *Id.*

35. See Shenk, *supra* note 30.

36. The Clinton administration submitted an amicus brief to the Supreme Court supporting the policy in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). Joe Lockhart, *Clinton Administration Compares Anti-Drug Record with GOP Drug Record*, U.S. NEWswire, Aug. 21, 1996.

rates ten times as harsh as those who sell powder cocaine.³⁷ Clinton also sought to influence the judiciary and its treatment of drug issues in the media as well.³⁸ Requesting over \$15 billion from Congress, and increasing the funding of the Drug Enforcement Administration (DEA) by eighteen percent, Clinton proposed the largest anti-drug budget ever for fiscal year 1997.³⁹ Set against a backdrop of increasing punitiveness, Clinton's failure to address such issues as accessible treatment, approval of needle-exchange programs which are shown to reduce the spread of HIV among injection drug users,⁴⁰ and the provision of

37. See Craig Reinerman & Harry G. Levine, *Real Opposition, Real Alternatives: Reducing the Harms of Drug Use and Drug Policy*, in *CRACK IN AMERICA*, *supra* note 23, at 351.

38. The case of U.S. District Judge Harold Baer is a perfect example. In January 1996, Judge Baer ruled to exclude evidence in a drug case based upon his finding that the police in the case did not have reasonable suspicion to search the trunk of a car. The police who conducted the search cited the fact that suspects in the case fled the scene, but Judge Baer found that in Washington Heights, the neighborhood where the incident took place, it is common for people to fear the police and flee. Baer was bombarded with criticism for his ruling by Clinton and numerous other political figures, including then-Senator Bob Dole. Baer subsequently allowed the evidence to be admitted, and eventually removed himself from the case. See Don Van Natta Jr., *Not Suspicious to Flee Police, Judge Declares*, N.Y. TIMES, Jan. 25, 1996, at B1; Clifford Krauss, *Giuliani and Bratton Assail U.S. Judge's Ruling in Drug Case*, N.Y. TIMES, Jan. 27, 1996, at 25; Ian Fisher, *Gingrich Asks Judge's Ouster for Ruling Out Drug Evidence*, N.Y. TIMES, Mar. 7, 1996, at B4; Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1; Don Van Natta Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. TIMES, Apr. 2, 1996, at A1; *An Alert from the Chief Justice*, N.Y. TIMES, Apr. 11, 1996, at A24; Don Van Natta Jr., *Judge Baer Takes Himself Off Drug Case*, N.Y. TIMES, May 17, 1996, at B1; Larry Neumeister, *Judge Withdraws from Drug Case, Clinton, Dole, Both Criticized for Decision to Exclude Evidence*, DAILY REC. (Baltimore), May 20, 1996.

39. See Lockhart, *supra* note 36.

40. Half of all new HIV infections each year are the direct result of contaminated syringes. See Barbara Vobejda, *AIDS Panel Sends Rebuke to Clinton*, WASH. POST, Mar. 17, 1998, at A12. On March 17, 1998, a 30-member Presidential Advisory Council on HIV and AIDS demanded that the administration lift the federal ban on funding for needle exchange programs. *Id.* The Council "voted unanimously to express 'no confidence' in the administration's commitment to stop new AIDS infections." *Id.* Noting that "[t]his may be the first time in history a presidential council has turned to the president and said, 'We have no confidence in you,'" Steve Sternberg, *Needle-exchange money demanded Clinton's AIDS panel doubts resolve*, USA TODAY, Mar. 17, 1998, at 1D, the Council claimed that "it is a lack of political will, not scientific evidence, that is creating this failure to act." Vobejda, *supra*.

In February of 1997, Health and Human Services Secretary Donna Shalala stopped just short of recommending that the 1993 federal ban on needle exchange funding imposed by Congress be lifted. Laurie Garrett, *Needle Exchange Debate; Shalala Releases an Inconclusive Report*, NEWSDAY, Feb. 19, 1997, at A19. Shalala is legally empowered to "unilaterally lift the . . . ban . . . but has chosen not to do so" because, notwithstanding scientific studies which have shown the opposite, Shalala has "not yet concluded that needle exchange programs do not encourage drug use. *Id.* Despite the endorsement of

treatment for addicts at high risk of contracting HIV and other diseases highlights his approach of playing to politics and imagery.⁴¹

B. Federal Legislation

The Anti-drug Abuse Act of 1988⁴² is the seminal piece of federal legislation addressing the widespread use of drugs and the problems associated with drug use—crime, violence, and poverty.⁴³ The stated goal of the Anti-drug Abuse Act was to “create a Drug-Free America by 1995.”⁴⁴ To that end, the Act

needle exchange as an effective HIV prevention strategy by the American Medical Association, the American Bar Association, the U.S. Conference of Mayors, the American Public Health Association, and a National Institutes of Health report, the administration has not wavered in its refusal to change current federal policy in this area. See John Gibeaut & James Podgers, *Pointed Argument: House Passes Needle Exchange Policy over Intense Opposition*, A.B.A. J. Oct. 1996, at 106; *Morning Edition* (NPR radio broadcast, Dec. 8, 1997); Vobejda, *supra*; John W. Fountain, *Protest at Agency Targets Rule on Needle Exchange: Hundreds Rally at HHS for Return of Funding*, WASH. POST, Sept. 18, 1997, at A17. Despite studying the efficacy of needle exchange for over five years, Sandy Thurman, White House AIDS policy chief, has defended the federal government's intransigence on this issue by maintaining that the “epidemic gets more complex every day . . . we are looking at issues that are more difficult, both politically and practically, to deal with.” *Morning Edition*, *supra*. For information about the efficacy of needle exchange programs, see generally Lawrence O. Gostin, et al., *Prevention of HIV/AIDS and Other Blood-Borne Diseases Among Injection Drug Users: A National Survey on the Regulation of Syringes and Needles*, 227 JAMA 53 (1997).

41. See *id.*; see also Robyn E. Blumner, *Tough-Guy Clinton Overrides Bill of Rights*, MILWAUKEE J. SENTINEL, June 23, 1996, at 3; Steven R. Salbu, *Needle Exchange, HIV Transmission, and Illegal Drug Use: Informing Law and Public Policy with Science and Rational Discourse*, 33 HARV. J. ON LEGIS. 105 (1996).

42. Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified in scattered sections of the U.S.C.).

43. For statistics on drug use in the United States, see generally *Substance Abuse and Mental Health Services Administration (SAMHSA) Office of Applied Studies, Advance Report No. 18*, Aug. 1996, <<http://www.samhsa.gov>> (on file with the author and the *Buffalo Law Review*); Anti-Drug Abuse Act of 1988, tit. V, § 5251(a), 21 U.S.C. § 1502 note (1988); See also *infra* note 83 (examining prevalence of drug use in welfare population). Reliable statistics on drug use among either the general population or the population of welfare recipients are nearly impossible to generate. Jeff Leen, an investigative reporter for the *Washington Post*, remarked in an interview on National Public Radio:

There are more than 50 databases of drug statistics. Everybody from the Justice Department to NIDA [the National Institute on Drug Abuse] to . . . health agencies. Everybody's got a little piece of the drug war, so they produce statistical databases from which you can make measures. So there are hundreds of measures. . . . You can find the numbers to support whatever thesis about the drug war that you want to put out there.

Drug War Numbers (All Things Considered, NPR radio broadcast, Jan. 2, 1998).

44. Anti-Drug Abuse Act of 1988, tit. V, § 5251(b) (codified at 21 U.S.C. § 1502 note

provided for the imposition of the death penalty for certain drug-related killings;⁴⁵ the denial of certain federal benefits such as contracts, loans, and licenses to those convicted of drug possession and trafficking;⁴⁶ provided for the eviction of public housing tenants involved in "drug-related criminal activity";⁴⁷ established a demonstration program to drug test criminal defendants;⁴⁸ and required federal agencies to develop drug testing procedures for all current employees and future applicants.⁴⁹

Recent changes to the Social Security Act imposes additional civil disabilities on drug users. Precluded from eligibility for Social Security benefits (SSI) are individuals for whom "alcoholism or drug addiction is a contributing factor material to the . . . determination that the individual is disabled."⁵⁰

(1988)).

45. Anti-Drug Abuse Act of 1988, tit. VII, § 7001.

46. Anti-Drug Abuse Act of 1988, tit. V, § 5301 (codified at 21 U.S.C. § 862 (1997)). First time drug traffickers can be denied these benefits for five years, third-time traffickers permanently. Specifically excluded from the list of deniable benefits were welfare and public housing.

47. Anti-Drug Abuse Act of 1988, tit. V, § 5101 (amending Section 6(1) of the United States Housing Act of 1937, 42 U.S.C. § 1437(d)(1)) (codified at 42 U.S.C. § 1437d(1)(5) (1990)).

For any grievance concerning an eviction or termination of tenancy that involves any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing agency or any drug-related criminal activity on or near such premises, the agency may,

inter alia, institute an expedited grievance procedure allowing for a speedier eviction, and restrict the rights of tenants to examine all the documents in the possession of PHA. 42 U.S.C. § 1437d(k)(6). "Cause" for termination of tenancy is defined by the statute as any criminal activity which threatens the health and safety of any other tenant. *Id.* § 1437d(l)(5). The statute defines drug-related activity to include the use of controlled substances. Anyone who is evicted from public housing is precluded from applying for residency for three years or until he or she successfully completes treatment approved by the PHA. *Id.* § 1437d(r).

48. Anti-Drug Abuse Act of 1988, tit. VII, § 7304 (codified at 18 U.S.C. § 3154 (1988)).

49. Anti-Drug Abuse Act of 1988, tit. V, §§ 5151-52 (creating the Drug Free Workplace Act of 1988)).

50. 42 U.S.C.S. § 1382 (A)(i)(I) (1996). Such individuals must comply with the provisions of the Act in order to continue receiving SSI and are subject to a schedule of suspension if they fail to comply. For example, individuals for whom addiction is a contributing, material factor to a determination of disability are required to undergo treatment at a facility approved by the Commissioner of Social Security. *Id.* § 1382 (A)(ii)(I)(aa). Since the law went into effect, nearly 197,000 people stand to lose their SSI benefits as a result. See Melanie Conklin, *Out in the Cold: Washington Shows Drug Addicts the Door: Impacts of Federal Welfare Reform*, THE PROGRESSIVE, Mar. 1997, at 25. Conklin reports that of the 135,000 appeals that have been filed, 53,000 have been granted and 52,000 denied. *Id.* Conklin discussed the practical impact of this law, including inter-

While these provisions represent the successful enactment of federal civil legislation dealing with drugs and their concomitant problems, attempts to pass more stringent legislation, and the debates surrounding such legislation, are illustrative precursors to the harsh provisions of the PRA.⁵¹

The proposed Family Welfare Reform Act of 1987⁵² "provided for the denial of benefits to any welfare recipient who had withdrawn from a treatment program before its completion. The recipient could become eligible for benefits again upon reentering treatment, or upon a 'medical determination' that he or she was drug free."⁵³ The provision was dropped before the Senate passed the Family Support Act of 1988.

Several recent proposals which failed to garner enough votes for passage specifically attempted to condition welfare receipt on drug testing. The language of these proposals, which were some of the first attempts to use drug testing as form of drug control in the context of welfare, foreshadow individual states' constructions of their own public assistance plans.⁵⁴ Senator John Ashcroft, a leading drug war crusader in the Senate, proposed several amendments during the course of federal legislative debates.

In 1995 Senator Ashcroft proposed an amendment to the

views with SSI recipients likely to lose benefits, and predicted that homeless rates will skyrocket. One woman described her search for work after her benefits had been cut: "dozens of work applications—mostly for dishwashing jobs—but . . . no offers." *Id.* Conklin wrote that "[s]he guesses it was because she had to admit on the applications that she has a felony conviction." *Id.* Conklin quoted the woman:

I've been clean for a year and seven months, but I still need to talk to my psychiatrist and take my medication Stopping the money doesn't bother me, but they stopped the medical part, too I'm not giving up. The main thing is to keep fighting and to keep my dignity.

Id.

See also Alex Kral, Jennifer Lorvick, & Ricky Bluthenthal, *Impact of Withdrawal of SSI Disability Benefits for Injection Drug Users in San Francisco Bay Area*, Presentation at International Conference for the Reduction of Drug-Related Harm, Paris (Mar. 1997) (on file with the *Buffalo Law Review*).

51. See PRA § 115 (denying assistance and benefits to individuals convicted of certain drug-related offenses) and PRA § 902 (authorizing states to implement drug testing provisions).

52. H.R. 1720, 100th Cong. § 809 (1987).

53. Guthrie, *supra* note 14, at 584.

54. Examination of failed proposals and the reasons why they failed are instructive in predicting the success of future proposals. While many of Missouri Senator John Ashcroft's proposals failed, the proposed "provisions are useful in sizing up Ashcroft's proclivity for using welfare reform as a cure for all ills," and can accurately predict the course of future action. Deborah Mathis, *Ashcroft Wanted to Use Welfare Reform for Drug Fight*, GANNETT NEWS SERV., July 19, 1996.

Job Training Act, which passed the Senate by a vote of 54-43.⁵⁵ The amendment sought to "establish a requirement that individuals submit to drug tests and to ensure that applicants and participants make full use of benefits extended through work force employment activities."⁵⁶ The bill was reported in the House on July 25, 1996, but never went to the House floor for a vote.⁵⁷

Ashcroft proposed another amendment containing a provision explicitly conditioning the receipt of welfare on the drug use-status of a recipient or applicant. The language is unequivocal, authorizing testing "[t]o ensure that welfare recipients are drug free as a condition for receiving welfare assistance."⁵⁸ The measure passed the Senate by a vote of 50-47.⁵⁹ Subsequently, a point of order that the amendment was in violation of Senate rules governing budget bills was sustained and the amendment was ruled out of order.⁶⁰

Ashcroft's success is embodied in what is now Section 902 of the PRA, authorizing the states to develop drug testing procedures for welfare recipients and for sanctioning those who test positive.⁶¹

Another leading drug war proponent in the Senate, Texas Senator Phil Gramm, was similarly successful, both in his proposed amendments to the Anti-drug Abuse Act of 1988 and the PRA.⁶² Speaking on his amendment to the Anti-drug Abuse Act to deny federal benefits to anyone convicted of a drug offense, Gramm invoked powerful images of predatory drug users de-

55. 141 CONG. REC. S14941 (daily ed. Oct. 10, 1995) (Ashcroft Amendment No. 2893). Republicans voted 42-10 and Democrats 12-33.

56. 141 CONG. REC. S14941-S14945 (daily ed. Oct. 10, 1995) (Ashcroft Amendment No. 2893 to S.143, the Workforce Development Act of 1995); 141 CONG. REC. D1189 (daily ed. Oct. 11, 1995).

57. 142 CONG. REC. S8105 (daily ed. July 18, 1996) (amendment 4901 offered by Senator Ashcroft); Telephone Interview with Annie Billings, Legislative Assistant to Senator John Ashcroft (Sept. 18, 1996).

58. 142 Cong. Rec. S8105 (daily ed. July 18, 1996) (Ashcroft Amendment 4901 to Personal Responsibility, Work Opportunity, Medicaid Restructuring Act).

59. *Id.* at S8108-09. Republicans voted 44-8, and Democrats 6-39. *Id.*

60. Billings Interview, *supra* note 57; see also Cheryl Wetzstein, *Democrats Blocked on Welfare Reform; Senate Slates Final Vote for Tuesday*, WASH. TIMES, July 20, 1996, at A3.

61. See *supra* note 5 and accompanying text. Senators Dole and Ashcroft co-authored a "Sense of the Congress" resolution "specifying that states could drug test welfare recipients and sanction those testing positive for drug use" in May 1996 which passed the Senate 92-8. John Ashcroft, *Ashcroft Proposes Drug-Free Requirement for Welfare*, CONG. PRESS RELEASES, July 18, 1996.

62. See *Punishment of Drug Offenders*, *supra* note 12 (analyzing the effects and logic of the 1996 Gramm Amendment).

stroying the future of our country and the happiness of our children:

[S]ome think that this [amendment] is too harsh. Quite frankly, though, I think the American people are ready to grab by the throat those who profiteer off the health, happiness and lives of our children. That is the purpose of that provision and that is, of course, what the purpose of the death penalty [sic], which is also a part of this bill.⁶³

The amendment, despite vigorous opposition,⁶⁴ passed the Senate by a vote of 78 to 11,⁶⁵ and accurately foreshadowed the success of Gramm's 1996 contribution to the PRA. Section 115 imposes a ban on public assistance to anyone convicted of a drug-related felony.⁶⁶

63. 134 CONG. REC. S15964 (daily ed., Oct. 14, 1988) (statement of Sen. Gramm). The bill's death penalty provision dealt with the imposition of the penalty for an aggravated homicide involving a drug transaction.

64. Senator Dale Bumpers responded to Gramm's comments on the amendment by saying:

Nobody wants to be mean spirited. We want to be tough and we want to be dramatic and, God knows, every Member of this body wants to do something about drugs. We all agree that drugs are eroding the moral fabric of the Nation. But just to grow hair on your chest here on the Senate floor so you can send out press releases back home and tell everybody how tough you are on drugs is no solution. It is a multifaceted problem and the solutions are multifaceted.

134 CONG. REC. S15971 (statement of Sen. Bumpers). Bumpers advocated for judicial discretion in the revocation of benefits, arguing that "[i]t is hard for a mother and her children to say no when a woman is living on \$360 a month SSI and all of a sudden her 18-year-old son starts bringing in \$15,000 a week. It is hard to say no." *Id.* He was also concerned that the punitive nature of the amendment would do little to address the real problems associated with drug use, and might actually exacerbate them. He described a situation where someone just released from jail on a drug charge would be ineligible for cash assistance, job training, public housing, and student loans. Bumpers said:

Now, you can take the position, 'Well, he brought it on himself,' and that is all well and good. But I can tell you one other thing. If we insist on that position, it is not he who will suffer, it is we who will suffer. Because he has no choice but to go back doing the only thing he knows how to do, and that is to traffic in drugs.

Id. at S15972. Senator Christopher Dodd suggested that criminal statutes already in existence suffice to punish illicit drug use.

If we want to talk about a penalty that really creates deterrence, and if the Senator from Texas has no qualms about it and really wants to stop drug use, and especially drug pushing, why not adopt the Moslem way of doing things—cut off a hand for a first conviction, cut off the other one for a second conviction? That would be a deterrent.

Id. at S15970 (remarks of Sen. Dodd).

65. *Id.* at S15976.

66. PRA § 115. The Gramm Amendment "permanently denies cash assistance and food stamps to anyone convicted under state or federal law of a felony offense that 'has

II. DRUG TESTING IN THE CONTEXT OF WELFARE: THE LANDSCAPE

Receipt of public assistance has been tied to some form of social control throughout the history of public charity—from requirements to participate in religious activities and forced acculturation, to recent efforts controlling morality and family structure.⁶⁷ Welfare exists within an “aura of suspicion”⁶⁸ and has

long been considered the equivalent of charity . . . its recipients . . . subjected to all kinds of dehumanizing experiences in the government's effort to police its welfare payments. In fact, over half a billion dollars are expended annually for administration and policing in connection with the [AFDC] program. Why such large sums are necessary for administration and policing has never been adequately explained. No such sums are spent policing the government subsidies granted to farmers, airlines, steamship companies, and junk mail dealers, to name but a few. The truth is that in this subsidy area society has simply adopted a double standard, one for aid to business and the farmer and a different one for welfare.⁶⁹

as an element the possession, use, or distribution of a controlled substance.” *Punishment of Drug Offenders*, *supra* note 12, at 983 (quoting PRA § 115(a)). The provision applies only to those convicted after August 22, 1996. Exempted from the statute are emergency medical services, short-term, non-cash, in-kind emergency disaster relief, prenatal care, job training, and drug treatment programs, PRA § 115(f), and “does not apply to ‘convictions occurring on or before [the law’s] enactment.’” *Punishment of Drug Offenders*, *supra* note 12, at 984 n.5 (quoting PRA § 115(d)(2)). The Gramm amendment is likely to deny welfare eligibility to as many as 200,000 people a year. *Id.* at 987-88, n.29 (citing Department of Justice statistics showing that over 300,000 people a year are convicted of felony offenses). The amendment contains a state “opt-out” provision which allows states to continue providing public assistance to convicted drug felons if such states enact affirmative legislation opting out of PRA § 115. See *infra* Appendix II for a detailed analysis of individual state responses to § 115.

Gramm’s 1988 amendment was careful to exclude means-tested federal benefits (public assistance), and the exclusion was evoked several times in the course of the debates to show that the amendment was not so harsh. A growing public intolerance of welfare and an escalation in the war on drugs made the passage of Gramm’s 1996 amendment possible.

Possession of a small amount of marijuana for personal use is considered a felony in only two states—Arizona and Nevada. See *Welfare Bill Eliminates Benefits for Drug Felons*, MARIJUANA POL’Y REP., July/Aug. 1996, <<http://www.mpp.org/welfare.html>> (on file with author and the *Buffalo Law Review*). However, cultivation of a single marijuana plant is a federal felony, and a felony in almost every state. Selling a small amount to a friend is also a felony. *Id.*

67. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (1993), MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* (1996). City mission shelters often require participation in religious services in return for room and board, and attendance at parenting classes or NA and AA groups are frequently a requirement even in nonsectarian shelters.

68. *Wyman v. James*, 400 U.S. 309, 332 (1971) (Douglas, J., dissenting).

Efforts to control drug use are not new to public assistance plans,⁷⁰ but directly conditioning the receipt of subsistence benefits on a negative drug test is a development of the 1990s—indicative of the turn of the 1960s war on poverty and the 1980s war on drugs to a war on the poor and on drug users.

One of the first efforts to merge drug control with welfare policy came in 1989 with a drug testing proposal in the Louisiana State Legislature. Couched in the language of "promoting the safety and welfare of children and adults," House Bill 303 "provided that all adults in public assistance programs be tested for drugs, and that individuals with positive test results be suspended from benefits programs until they completed education

69. Skelly Wright, *Poverty, Minorities, and Respect for Law*, 1970 DUKE L.J. 425, 437-38 (1970).

70. See, e.g., New York's Social Services Law in effect immediately prior to its Summer 1997 welfare reform plan, which provided for the imposition of certain requirements and sanctions against applicants for or recipients of home relief for whom drug or alcohol abuse was a "primary cause of his or her need for public assistance." N.Y. SOC. SERV. LAW § 158-a (1996); N.Y. COMP. CODES R. & REGS. tit. 18, § 370.2 (d)(7)(i) (1996). Social service officials had the authority pursuant to the law to require the applicant or recipient to "participate in an appropriate rehabilitative program, when available," and further provided that "[s]uch participation in rehabilitative programs . . . shall be a condition of eligibility for the granting or continuation of public assistance to such applicant or recipient." N.Y. SOC. SERV. LAW § 158-a. The law also provided a schedule of sanctions for noncompliant recipients and applicants.

Requiring applicants and recipients to participate in rehabilitative programs *de facto* exposes them to random drug testing (although some would argue not suspicionless, for they were assigned to programs upon some degree of suspicion). Although there were no challenges to the constitutionality of this kind of drug testing, the inquiry would center on the availability of the results of drug tests to those outside the treatment facility. If someone tested positive while in treatment, that person would be reported to social services and sanctioned. One step removed from the process, the determination of the social services official results in the testing, and the department of social services would indirectly have access to the results of a recipient's drug test.

Although this type of testing has never been challenged against the due process provisions of the Fourteenth Amendment, the fact that involuntary treatment—failure to participate resulting in the suspension or loss of benefits—can be imposed as a result of the determination of a single social services official without any specialized training in substance abuse or addiction—not to mention *detecting* such abuse or addiction—, Telephone Interview with Ms. Brown, Office of Alcohol and Substance Abuse Services of the State of New York (OASAS) (July 17, 1996), is evidence of a scant amount of due process. Comparable federal regulations specify that a railroad must have reasonable suspicion before requiring an employee to submit to drug testing. 49 C.F.R. § 219.300(a)(1) (1998). Such determination of reasonable suspicion "must be based on specific, contemporaneous, articulable observations . . ." *Id.* at § 219.300(a)(2). In order to require a urine drug test, such observations must "be made by two supervisors, at least one of whom is trained," *id.* § 219.300(b)(2), "in the signs and symptoms of alcohol and drug influence, intoxication and misuse . . . [and] such training shall not be less than 3 hours." 49 C.F.R. § 219.11(g).

and rehabilitation programs and passed follow-up drug tests.⁷¹

Prior to the passage of the PRA, federal "waivers" were required before states enacted any revisions in their welfare schemes which deviated from federal policies.⁷² South Carolina, the recipient of one such waiver, became the first state to make drug testing part of its welfare program.⁷³

In a plan implemented on October 1, 1996, welfare recipients in South Carolina who have "drug or alcohol related arrest[s] . . . or if a mother gives birth to a baby showing signs of maternal drug abuse, or if the social worker sees symptoms of illegal drug use, the welfare recipient is shuttled off to the state's alcohol and drug abuse department," where he or she is screened and sent to a treatment program.⁷⁴ No sanctions are imposed if the recipient complies with the treatment program requirements. However, recipients will be sanctioned if "it is confirmed that they have used drugs," or if they refuse treatment.⁷⁵

A plan introduced by a bi-partisan Maryland legislative committee to the Maryland General Assembly in early December of 1996 would have required the testing of all applicants for Temporary Cash Assistance, Maryland's AFDC program.⁷⁶ Re-

71. Guthrie, *supra* note 14, at 585 (citing H.R. 1303, Reg. Sess. (La., 1989)).

72. Section 1115 of the Social Security Act, 42 U.S.C. § 1315 (1990) authorized the Secretary of Health and Human Services to waive various provisions of the Social Security Act to allow states to experiment with different methods of delivering public assistance. Likewise, the Secretary of Agriculture can waive provisions of the Food Stamp Act, 7 U.S.C. § 2011 (1964).

73. See William Booth, *Florida County Sets Drug Tests for Welfare Clients*, WASH. POST, Sept. 17, 1996, at A3. See also Dave Williams, *Beasley, Republican Governors Tout Dole Tax Plan*, STATES NEWS SERV., Sept. 17, 1996 (noting that South Carolina's "reasonable suspicion" requirement for drug testing was the result of the Clinton administration's delay of 11 months in approving a federal waiver). Prior to the passage of the PRA, four states had waivers to require substance abuse treatment as a condition of welfare receipt: Utah, Kansas, Oregon, and South Carolina. See Julie Strawn, *Substance Abuse and Welfare Reform Policy*, Feb. 24, 1998, <<http://www.welfareinfor.org/strawn.htm>> (on file with the Buffalo Law Review).

74. See Williams, *supra* note 73.

75. *Id.*

76. See Jon Jeter, *Md. May Tie Drug Testing, Welfare Cash*, WASH. POST, Dec. 4, 1996, at A1 [hereinafter Jeter I]; see also William F. Zorzi, *Md. Welfare Plan Would Test Applicants for Drug Use: Abusers Would Face Treatment Program, Possible Loss of Benefits*, BALTIMORE SUN, Dec. 4, 1996, at A1; DeWayne Wickham, *Md. Welfare Drug-Testing Plan a Model for Others*, USA TODAY, Dec. 11, 1996, at A15. Sanctions would only have applied if treatment was available under Maryland's plan. Zorzi, *supra*. Already the wait for treatment in some Maryland counties is two months long; the number of people seeking drug counseling could double if the plan is implemented. See Jon Jeter, *Drug Testing Plan Could Balloon Md. Welfare Cost: Influx of People Seeking Treatment Would Sap Resources, Analysts Say*, WASH. POST, Dec. 5, 1996, at E1 [hereinafter Jeter II]. See *infra*

sponding to "a storm of public protest,"⁷⁷ the Maryland State Senate approved a bill "requir[ing] welfare applicants to go through health screenings and, *if suspected* of abusing drugs, to submit to drug testing."⁷⁸ An applicant referred to drug treatment would be randomly retested, and if he or she refused the test or tested positive again, the applicant would lose the parent's portion of the welfare grant, with money to the children paid to a third party.⁷⁹ Criticism of the proposal centered around its cost,⁸⁰ the lack of treatment slots,⁸¹ treatment's resultant effectiveness,⁸² its focus on poor parents,⁸³ and its constitutional

note 246 (providing national statistics on the lack of treatment availability).

77. Sean Scully, *Assembly Moving Slowly on Legislation*, WASH. TIMES, Mar. 15, 1997, at C7.

78. *Senate-Approved Bill Would Allow Tax on Tape, Game Rentals; Legislation Would Require Tests for Welfare Applicants*, BALTIMORE SUN, Mar. 15, 1997, at 20B.

79. Jeter I, *supra* note 76, at E1. "For a family of three, the loss of the parent's share of the monthly grant would be \$81, reducing the total from \$373 to \$292 for the two children." *Id.*

80. Estimated at over \$1.2 million to drug test more than 60,000 welfare applicants a year, at \$18 per drug screening—this cost does not include treatment or challenges to the veracity of the test. Jeter II, *supra* note 76. Some estimate that the cost of each test could rise to \$100 apiece in order for the test to withstand a court-challenge. *Id.* Maryland State Senator Ulysses Currie predicts that ten percent of all applicants will test positive, and five percent will refuse treatment. Ulysses Currie, *Maryland Must Test for Welfare Addicts*, WASH. TIMES, Feb. 18, 1997, at C2. See *supra* note 11 (detailing the costs of drug testing).

81. Robert V. Hess, Editorial, *Executive Director of Action for the Homeless, Punishing the Poor Without Helping Them*, BALTIMORE SUN, Dec. 13, 1996, at A26. Hess noted that "[s]tate spending on treatment has been reduced by 20 percent since 1991, most recently cut by \$500,000 in July." *Id.* The waiting period for a treatment slot in Prince George's County is two months, and currently only one-third of those needing treatment in Maryland receive it. Currie, *supra* note 80, at C2. See also Derrick Z. Jackson, *Mandatory Drug Tests are a Way of Branding the Poor*, BOSTON GLOBE, Dec. 13, 1996, at A35.

82. Treatment in Maryland consists of short-term abstinence-based detoxification and outpatient treatment. Peter Reuter, *A Reform that Should be Rejected: For Users on Welfare, Drug Tests May Do More Harm Than Good*, WASH. POST, Dec. 29, 1996, at C1. Reuter correctly observed that in addition to current treatment inadequacy, "[a]bstinence is hard to maintain in communities where drugs are commonly used and readily available and other sources of satisfaction scarce." *Id.* Additionally, he noted, "[f]ew clients of public drug treatment programs succeed in getting and keeping a job, let alone one that is good enough to keep them and their children out of poverty." *Id.*

83. Although "[r]esearch suggests that up to [twenty] percent of the 4.4 million families receiving welfare benefits nationwide are headed by a parent who has a substance abuse problem," Jeter I, *supra* note 76, Steven Savner, a senior lawyer with the Washington-based Center for Law and Social Policy maintains that "it is unclear whether drug use among [the welfare] population is any greater than the population at large." *Id.* "National estimates of the fraction of [AFDC] recipients who are drug abusers vary from 4 percent to nearly 30 percent." Reuter, *supra* note 82. According to the National Institute on Alcohol Abuse and Alcoholism, "contrary to common characterizations of the

validity.⁸⁴ Despite these solid critiques and strident public opposition to drug testing in Maryland, the state's final welfare reform plan requires applicants and recipients to undergo a mandatory health screen, and to sign a medical release allowing the department of social services to have access to the results of any drug test performed in the course of the health screen.⁸⁵

The PRA required states to submit welfare reform plans to the federal government by July 1, 1997. The result of state efforts to restructure and reform welfare delivery systems is a collage of programs with several common themes, but disparate policy choices with regard to drug users. Running through nearly all of the state welfare reform laws is the notion of "personal responsibility,"⁸⁶ and many states have created a contractual system of welfare delivery which requires applicants and recipients to enter into a contract with the state.⁸⁷ The use of "personal responsibility contracts," and the legislative granting of complete discretion to local departments of social services to determine public assistance eligibility⁸⁸ make it difficult to de-

welfare population as having alcohol or drug problems,' its percentages of heavy drinkers and drug abusers are similar to the rest of society." Jackson, *supra* note 81. But see MAKING WELFARE REFORM WORK, *supra* note 11, at 4. See also *supra* note 42 (noting that "[y]ou can find the numbers to support whatever thesis about that drug war that you want to").

84. Maryland Governor Parris Glendening did not endorse the plan, citing possible constitutional problems. See *cf.* Zorzi, *supra* note 76. One of the problems with the plan is its suspicionless standard—a universal approach to a group of people "without some reasonable evidence that someone is using illegal substances." Jeter I, *supra* note 76. See *infra* notes 194-96, 222-29, and 240-41 and accompanying text (discussing suspicionless standards).

85. S.B. 499, ch. 593, 1997 Reg. Sess. (Md. 1997) (Maryland Welfare Innovation Act of 1997).

86. See, e.g., 1997 Ark. Acts 1058, H.B. 1295, 81st Reg. Sess. (Ark. 1997) (creating Arkansas Personal Responsibility and Public Assistance Reform Act); GA. CODE ANN. § 49-4-184 (1997) (establishing Georgia's "Personal Responsibility Obligation"); S.B. 259, 72d Leg. Assembly, 1997 Reg. Sess. (S.D. 1997) (creating South Dakota personal responsibility act).

87. See, e.g., 1997 Alaska Session Laws 98, H.B. 75, ch. 98 (Personal Responsibility Plan); S.B. 120, 61st Gen. Assembly, 1st Reg. Sess. (Colo. 1997) (Individual Responsibility Contract); GA. CODE ANN. § 49-4-184 (1997) (Personal Responsibility Plan); MISS. CODE ANN. § 43-17-5 (1997) (Personal Responsibility Contract); H.B. 1, 75th Leg., Reg. Sess. (Tex. 1997) (personal responsibility contract); W.VA. CODE § 9-9-3(i) (1997) (defining personal responsibility contract). An examination of contract law within a welfare context is beyond the scope of this work. However, this turn towards creating a contractual relationship between welfare recipients and the state may create additional avenues for challenge based on contract law which should be explored by welfare recipient advocates.

88. See, e.g., H.B. 526, 64th Biennial Sess. (Vt. 1997) (granting broad discretion to Vermont Department of Social Services); S.B. 259, 72d Leg. Assembly, Reg. Sess. (S.D. 1997) (legislating that discretion in establishing eligibility for public assistance vested

termine which states will drug test welfare recipients, and what form that testing will take. Likewise, state plans which impose strict work requirements may present "drug testing snags" for current welfare recipients. Wisconsin's plan, what welfare-watchers call one of the nation's toughest, requires all current recipients to begin working almost immediately in either the private sector or in community service jobs.⁸⁹ Many jobs available to men and women moving off of the welfare rolls are low-wage, low-skill jobs at agencies and businesses which, eager to take advantage of state subsidies, are increasingly turning to drug testing to weed out "problem" welfare workers.⁹⁰

Of those state welfare reform plans that directly address drug testing, only two states plan to implement a system of mandatory, suspicionless drug testing—Maryland's health screen, and Louisiana's plan, which is contained in a larger piece of legislation conditioning the receipt of "anything of economic value from the state" on a negative drug test.⁹¹ Several

with Department of Social Services).

89. Jason DeParle, *Getting Opal Caples to Work*, N.Y. TIMES MAGAZINE, Aug. 24, 1997, at 33.

90. An employment counselor with the Wisconsin Works program (W-2) described a day at work where she told welfare recipients gathered in her office that "she ha[d] more bingo jobs for anyone who [could] pass a drug test." *Id.* at 36. In response, one woman asked whether marijuana was a drug. *Id.* See also WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 121-22, 132 (1996) (describing the connection between inner-city black male joblessness and the failure of some applicants to pass drug-screening tests).

91. H.B. 2435 Reg. Sess. (La. 1997) [hereinafter La. H.B. 2435]. House Bill 2435, enacted July 1997 requires anyone testing positive for drugs to complete a treatment program, paid for by private insurance or by the individual him or herself. LA. REV. STAT. ANN. § 1021(E) (West 1997). Refusal to submit to the test, or a second positive test result would result in the loss of state benefits, including but not limited to: employment termination, removal from office, loss of a license, loan, scholarship, contract, or public assistance benefit. *Id.* § 1021(F). However, receipt of public assistance will not be denied anyone who is participating in treatment. *Id.* § 460.4(C). Assistance will not be denied if treatment is unavailable. *Id.* The Louisiana Legislature's intent is expressed in section 1021(A)(1), which reads:

The Legislature does hereby declare that a state of emergency exists in Louisiana as a result of the spiraling increases of abuse of illegal substances by its citizens. The Legislature further declares that such illegal drug abuse presents a clear and present danger to the health, welfare, and security of the state, its citizens, and government. The Legislature acknowledges that the terrible cost of drug abuse is ultimately paid by all of the state's citizens in the form of public monies expended to eradicate, interdict, and destroy such illegal substances, keep those substances away from our homes, families, schools, and children, operate a costly and massive criminal justice system for violators, and continue to attempt to rehabilitate those who have lost the struggle to be free of illegal drugs. The Legislature further acknowledges that all its citizens eventually pay

states single out certain classes for drug testing.⁹² Colorado plans to drug test anyone receiving disability benefits if the primary cause of the disability is alcohol or substance abuse,⁹³ Minnesota will drug test public assistance applicants and recipients who have been convicted of drug-related offenses,⁹⁴ and Ohio will drug test caretakers of children receiving assistance in certain counties and pregnant women receiving medical assistance.⁹⁵

A number of states have implemented suspicion-based drug testing schemes. For example, in New York State applicants for and recipients of public assistance will be periodically "screened"⁹⁶ for substance use, and are also required to submit

the high price of illegal substance abuse by way of decreased productivity in the work place, and higher costs for goods and services throughout the state's economic apparatus. The elderly, in particular, are especially affected by crimes of violence perpetrated by drug abusers who murder and rob to support their drug habit. Children, especially from lower income families, suffer unnecessarily from drug abuse when they go unfed, ill clothed, and without proper medical treatment because drug abusing adults in the household spend badly needed money for illegal substances. Many times the drug abusers deny themselves proper medical treatment to obtain illegal drugs, often becoming not only ill, but indigent as well. The Legislature therefore believes that government has a compelling interest to insure, protect, and safeguard its citizens from the scourge of illegal drug abuse, whether in the classroom or the halls of government.

The Louisiana Legislature provided for a mechanism whereby affected individuals may challenge the constitutionality of the law prior to its implementation. La. H.B. 2435. Slated to go into effect in the Summer of 1998, Louisiana's plan is already facing opposition. Scott Dyer, *ACLU Wants to Challenge New La. Drug-Testing Law*, THE ADVOCATE (Baton Rouge, La.), Nov. 17, 1997, at 1A. The ACLU is gearing up to challenge the law in court, and many in the state are concerned about the law's potential cost, which is estimated at over \$5 million annually. Marsha Shuler, *Foster Eyes Lower Drug-Test Cost*, THE ADVOCATE (Baton Rouge, La.), Nov. 20, 1997, at 11E. One of Louisiana Governor Mike Foster's ideas for reducing the cost of the plan is to reduce the cost of the rehabilitation component of the program. *Id.*

92. While not a part of welfare reform, Missouri passed a law requiring pregnant women and newborns to undergo drug testing and specifically abrogating physician-patient privilege with regard to such tests. The law enables the department of health to obtain results of such tests. MO. REV. STAT. § 191.745 (1996). See also 1997 Missouri H.B. § 20.690(1) (1997) (providing for drug and alcohol testing for women).

93. COLO. REV. STAT. R.S. 26-2-111(4)(e)(I) & (II) (1996).

94. Ch. Law 85, S.F. No. 1, 1997 Reg. Sess. (Minn. 1997).

95. H.B. 408, § 5107.71, 122d Gen. Assembly, Reg. Sess. (Ohio 1997).

96. While collecting urine, blood, or hair samples has been referred to as "screening" for drugs, screening more precisely refers to either written or oral "tests" designed to assess whether the respondent either uses, or has a problem using, alcohol or drugs. See MAKING WELFARE REFORM WORK, *supra* note 11, at 47. The Legal Action Center, in its comprehensive study of issues affecting substance users in welfare reform plans, describes a number of screening devices, including C.A.G.E., SASSI (Substance Abuse Sub-

to a drug test if such "screening" indicates that the applicant or recipient has a substance abuse problem.⁹⁷

Many states which did not formally provide for drug testing within their welfare reform plans have chosen to identify applicants and recipients who use drugs by using screening techniques,⁹⁸ requiring self-declarations,⁹⁹ or by relying on reports from criminal justice personnel.¹⁰⁰

the Screening Inventory), SMAST (Short Michigan Alcoholism Screening Test), and ASI (Addiction Severity Index). *Id.* (citing Martha Morrison Dore et al., *Identifying Substance Abuse in Maltreating Families: A Child Welfare Challenge*, 19 CHILD ABUSE & NEGLECT 531 (1995); J.A. Ewing, *Detecting Alcoholism: The CAGE Questionnaire*, 252 JAMA 1905 (1971)). Criticism of these screening devices centers around their reliability, the sanctions or requirements imposed on test-takers who are assessed as having substance abuse problems, and the fact that such questionnaires violate the Americans with Disabilities Act. *See infra* Section III.D., note 154 and accompanying text.

97. S.B. 5788, 220th Annual Leg. Sess. (N.Y. 1997) (amending N.Y. Soc. Serv. L. § 132 by adding subdivision 4). The state's new "Office of Temporary and Disability Assistance" adopted accompanying regulations on September 25, 1997, N.Y. COMP. CODES R. & REGS. tit. 18, § 351.2 (1997), and drug screening went into effect in November 1997. *See also* 305 ILL. COMP. STAT. ANN. § 4-19 (West 1993); H.B. 1080, 90th Gen. Assembly, Reg. Sess. (Ill. 1997) (providing for suspicion-based testing for caretaker/relatives); KAN. STAT. ANN. § 39-7, 113(a) (1996) (pilot program for suspicion-based drug testing); 62 PA. CONS. STAT. § 405.3(a)(7) (1997) (suspicion-based drug testing); S.C. CODE ANN. § 43-5-1190 (1996) *amended by* 1997 S.C. Acts 133, H.B. 3650, (S.C. 1997), R. 235 (S.C. 1997) (suspicion-based drug testing). *See also infra* Appendix I (detailing state-by-state drug testing plans).

New York's law provides that

when the screening process indicates that there is reason to believe that an applicant or recipient is abusing or dependent on alcohol or drugs, the social services district shall require a formal alcohol or substance abuse assessment, which may include drug testing, to be performed by an alcohol and/or substance abuse professional credentialed by the Office of Alcohol and Substance Abuse Services. The assessment may be performed directly by the District or pursuant to contract with the District.

S.B. 5788 pt. B § 23 (to be codified at N.Y. Soc. Serv. L. § 132(4)(B)).

In efforts to implement regulations pursuant to this law before it had even been passed, the New York State Department of Social Services issued a draft Administrative Directive which set forth the method by which drug testing would be accomplished. The draft read, in part, that "gender appropriate staff must 'accompany' the applicant/recipient and 'observe' the collection of the urine sample to preclude substitution or alteration of the sample Once the sample has been collected procedures must exist to ensure the integrity of handling, processing, and testing the sample." Greater Upstate Law Project, Inc., Coalition for the Homeless, *DSS Takes Steps to Implement Pataki Welfare Plan; Advocates Charge They Jumped the Gun*, Press Release, May 19, 1997 (on file with the Buffalo Law Review) (quoting draft ADM on Governor's proposed Article XVII Safety Net Program).

98. *See MAKING WELFARE REFORM WORK*, *supra* note 11, at 36, 79-81. *See also supra* note 96.

99. *See MAKING WELFARE REFORM WORK*, *supra* note 11, at 36, 79-81.

100. *See* S.B. 841 1997 Sess. (Va. 1996) (authorizing parole and probation officers to

III. CHALLENGING THE LAW

A challenge to any state plan to condition the receipt of welfare on a drug test will inevitably be based in part on the privacy protections in the Fourth Amendment's proscription of unreasonable searches and seizures.¹⁰¹ Other constitutional bases are the due process protections and the equal protection clause of the Fourteenth Amendment. The challenge could also be statutory, based on the protections offered by the Americans with Disabilities Act, or doctrinal, based on the doctrine of Unconstitutional Conditions. Additionally, state constitutions may provide greater protections to welfare recipients than the federal constitution.

A. State Constitutional Challenge

State constitutions may afford more protection to welfare recipients in the wake of welfare reform than any protections embodied in the federal constitution.¹⁰² Notwithstanding the federal and state governments' *intent* to withdraw any entitlement to welfare,¹⁰³ twenty-two state constitutions include some provision for the care of the needy, and twelve state constitutions contain a specific obligation of the state to care for the needy.¹⁰⁴ New York, for example, is uniquely situated vis-à-vis the changes states are required to make to their public assistance programs pursuant to the PRA. Its constitution contains a provi-

notify department of social services when persons under their supervision have tested positive for drugs twice); VA. CODE ANN. § 63.1-105.8 (Michie 1997) (requiring that upon notification from parole or probation officer of recipient's two failed drug tests, aid rendered as vendor payments to third-party payees). *See also* H.B. 526, 64th Biennial Sess., § 266 (Vt. 1997) (authorizing department of social services to receive conviction records for all current recipients).

101. For a brief review of constitutional challenges to drug testing in an employment context, see Kenneth C. Haas, *Drug Testing and the Constitution*, in HANDBOOK OF DRUG CONTROL, *supra* note 21, at 245-66.

102. *See* Daan Braveman, *Children, Poverty, and State Constitutions*, 38 EMORY L.J. 577 (1989). Braveman identifies four distinct reasons that state constitutions afford a greater breadth of protection to welfare recipients: more generous textual provisions, state common law traditions, the political accountability of the state court judiciary, and the lack of federalism constraints on state courts. *Id.* at 603-13. *See also* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985); David Schuman, *The Right to "Equal Privileges and Immunities": A States Version of "Equal Protection,"* 13 VT. L. REV. 221 (1985) (noting that 15 states have equal privileges and immunities clauses).

103. *See, e.g.*, MONT. CODE ANN. § 53-4-231(3)(I) (1997) (stating that "[t]his part may not be interpreted to entitle any individual or family to assistance").

104. Braveman, *supra* note 102, at 595-96 & nn.90-95.

sion mandating that the state provide some level of assistance to the poor.¹⁰⁵ Although there have been numerous calls to amend the Constitution and delete the guarantee of aid to the poor,¹⁰⁶ it is likely that Article 17 will serve as a bar to some of the more egregious and draconian welfare reform measures.¹⁰⁷

105. Article XVII of the New York State Constitution reads: "The aid, care and support of the needy are public concerns and shall be provided by the state . . . in such a manner and by such means, as the legislature may from time to time determine." N.Y. CONST. art. XVII. New York courts have, since 1977, recognized that Article XVII mandates aid to the needy. *Tucker v. Toia*, 43 N.E.2d 449, 451 (1977) ("In New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by [Article 17] of our Constitution."). While New York courts have debated the extent to which the courts can dictate the manner in which the legislature apportions benefits to the needy, it is undisputed that a complete denial of aid to the needy is unconstitutional. *Id.* at 452. *Cf. Barie v. Levine*, 357 N.E.2d 349, 352 (1976) (upholding temporary suspension of aid to those unjustifiably refusing employment as a choice of "manner"). See Christine Robitscher Ladden, Note, *A Right to Shelter for the Homeless in New York State*, 61 N.Y.U. L. REV. 272, 275-81 (1986) (discussing New York's judicial interpretation of Article 17).

106. See, e.g., John J. Marchi, *New York's Welfare Meltdown*, N.Y. TIMES, Aug. 12, 1996, at A15 (editorial by Republican state senator calling for an amendment to the N.Y. Constitution altering Article 17 to read that the state "may provide" for the needy in place of "shall provide"); Jerry Gray, *Quit Complaining About Bill, Rep. Kasich Tells Governors*, N.Y. TIMES, Aug. 2, 1996, at A17 (Ohio Republican suggests that states required to care for the needy per constitutional mandate "should consider changing their laws"). Article XIX, § 2 of the New York Constitution requires the state's voters to decide, every 20 years, whether to hold a constitutional convention. See Ladden, *supra* note 105, at 285-96 (describing process to amend N.Y. Constitution and reviewing legislative history of Art. XVII). New Yorkers defeated the ballot measure calling for a constitutional convention in the November 1997 elections. Richard Perez-Pena, *The 1997 Elections: Ballot Question; Voters Reject Constitutional Convention*, N.Y. TIMES, Nov. 5, 1997, at B1.

107. The New York Civil Liberties Union stood poised to bring a constitutional challenge to mandatory, suspicionless drug testing and to a bar on convicted felon receipt of welfare had such proposals passed in New York State. Harvy Lipman, *Pataki's Welfare Proposal Criticized*, TIMES UNION (Albany, N.Y.), Mar. 21, 1997, at B2. Provisions in the PRA forbidding states from providing any aid whatsoever to illegal aliens, and imposing heavy restrictions on aid to certain types of legal immigrants, are the provisions most likely to be in conflict with Section 17. Accordingly, New York City Mayor Rudolph Giuliani, the Center for Constitutional Rights, the N.Y. Legal Aid Society, and the American Civil Liberties Union for Northern California filed class-action lawsuits in New York and San Francisco on March 26, 1997, challenging the constitutionality of the new laws affecting legal immigrants. See David Firestone, *Giuliani Suit to Contest Cutoff of U.S. Benefits to Immigrants*, N.Y. TIMES, Mar. 26, 1997, at B3. The suits base their challenge on the due process clause. *Id.* A preliminary injunction was granted on March 31, 1997, enjoining states from putting into effect April 1 cuts in benefits. *Id.* For a preliminary analysis of the likely success of that suit, see Virginia Ellis & Patrick J. McDonnell, *Lawsuits Target U.S. Cuts in Aid for Immigrants*, L.A. TIMES, Mar. 27, 1997, at A3. Recently struck down as per Section 17 was a law that, by imposing a six-month waiting period, effectively denied benefits to a class of primarily single adults who move to New York from other states. See Ben Dobbin, *Law Restricting Home Relief Aid struck Down*,

New York courts have refused to require that the legislature provide sufficient benefits for the poor, as have many other state courts where aid to the needy is a constitutional guarantee. State courts are generally

[r]eluctan[t] to set welfare levels, a function better performed by the legislature. [This] causes . . . court[s] to draw an artificially bright line: the state constitution precludes a complete denial of benefits to the needy, but grants the legislature virtually complete discretion to determine the means for providing aid, the amount of the aid, and the definition of who is needy.¹⁰⁸

Montana courts have gone further by showing a willingness to examine the sufficiency of public assistance benefits.¹⁰⁹ In *Butte Community Union v. Harris*, the Montana Supreme Court struck down a state plan which imposed time limits and other efforts to cut back on public assistance, holding that

[t]he State may legitimately limit its expenditures for public assistance, public education or any other program even-handedly applied. It may not limit its expenditures by the expedient of eliminating classes of eligible individuals from public assistance without regard to their constitutionally grounded right to society's aid when needed, through misfortune, for the basic necessities of life.¹¹⁰

The Court in *Butte Community Union* found that a determination of the reasonableness of a state plan was not simply a matter of legislative discretion, but rather a question of fact to be addressed by the court. The strength of this holding will be important to a determination of whether the Montana legislature may deny public assistance to anyone convicted of a drug-related felony.¹¹¹

Alaska's *Ravin v. State*¹¹² provides another example of the greater protections afforded under state constitutions. In *Ravin*,

BUFF. NEWS, Oct. 22, 1996.

108. See Braveman, *supra* note 102, at 599.

109. *Id.* at 602 (citing *Butte Community Union v. Harris*, 745 P.2d 1128 (Mont. 1987)).

110. *Id.* at 601.

111. See MONT. CODE ANN. § 53-4-231(3)(I) (1997); See *infra* Appendix II. Montana is one of the states which has attempted to statutorily abrogate entitlement to welfare. MONT. CODE ANN. § 53-4-231(5).

112. 537 P.2d 494 (Alaska 1975). A January 30, 1998, Hawai'iian Supreme Court decision interpreting article I, section 6 of the Hawai'i Constitution let *Ravin* stand, but limited its holding to private possession and use of marijuana in the home. *Hawai'i v. Mallan*, 950 P.2d 178 (Haw. 1998) (holding that the Hawai'iian Constitution's privacy protections do not encompass a right to possess and use marijuana for recreational purposes in a public parking lot).

the court decided a case involving marijuana possession, holding that "citizens of Alaska have a right to privacy under the state constitution," and "that right would encompass the possession and [use of] . . . marijuana in a personal, non-commercial context in the home."¹¹³ An expanded privacy right under the Alaska constitution will animate a challenge to sanctions levied under the terms of the Alaska Temporary Assistance Program's "contract system,"¹¹⁴ and to the provision in Alaska's welfare reform which renders convicted drug felons ineligible for food stamps.¹¹⁵

B. Federal Due Process

The Fourteenth Amendment protection of due process in the context of welfare reached its apogee with the Supreme Court's decision in *Goldberg v. Kelly*,¹¹⁶ which established a federal entitlement to welfare. *Goldberg* applied a two-part test which asked: (1) does due process apply, that is, is the right a property interest, and if so, is there a government actor threatening to take it away? If due process does apply, (2) what process is due? While the rhetoric surrounding welfare reform suggests that public assistance will no longer be a federal entitlement,¹¹⁷ and some states have codified an intent to abrogate state entitlement,¹¹⁸ the existence of a "right" or entitlement to welfare will still depend on whether an applicant or recipient can show a property interest in such benefits. Such a property interest or right may be found in state constitutional law,¹¹⁹ state statutes

113. Braveman, *supra* note 102, at 605 (citing to *Ravin*, 537 P.2d at 504).

114. See *ATAP Family Self-Sufficiency Plan*, Oct. 7, 1997, <<http://health.hss.state.ak.us/htmlstuf/pubassis/FSSP.htm>> (on file with the *Buffalo Law Review*); see also *supra* note 87 and accompanying text (discussing contract system of welfare delivery).

115. See *MAKING WELFARE REFORM WORK*, *supra* note 11; see also *infra* Appendix II, n.1.

116. 397 U.S. 254 (1970).

117. The "block grant" approach taken by federal welfare reform removes the entitlement to public assistance for anyone who meets the program's eligibility requirements. Funding for programs under the block grant approach does not increase as demand for assistance grows. See Susan V. Demers, *The Failures of Litigation as a Tool for the Development of Social Welfare Policy*, 22 *FORDHAM URB. L.J.* 1009, 1010 n.15 (1995).

118. See, e.g., 1997 Montana Laws 486.

119. See N.Y. CONST. art. XVII (guaranteeing aid to the needy). See *supra* notes 102-06 and accompanying text. The New York Court of Appeals struck down a state law which denied welfare benefits to anyone under 21 not living with a parent or relative unless that young person sued his or her parents for support . . . [ruling] that the state can't use the denial of public assistance as a tool to change behavior which is not related to whether or not someone is needy.

and regulations, or in the practices adopted by the state.¹²⁰

Once a right to a specific benefit is established, the second prong of a due process analysis looks to the process that is required. State plans have been careful to include both notification and appeals processes in testing schemes, provisions which usually result in a determination of adequate due process. However, state plans which require mandatory drug testing or treatment upon the determination of a social services official can be challenged by looking at the process by which a social services official makes that determination and the qualifications of the official.¹²¹

Lipman, *supra* note 107, at B2 (citing *Tucker*, 43 N.Y.2d at 9).

120. See, e.g., *McCain v. Koch*, 484 N.Y.S.2d 985, 987 (Sup. Ct. 1984) (While "[n]either the Constitution nor the [N.Y.] Social Services Law . . . provide that emergency shelter be given to the needy in explicit terms," once the state has undertaken to provide emergency shelter, that shelter must meet "reasonable minimum standards."). Due Process challenges in New York State are rarely resolved at trial. See *Demers*, *supra* note 117, at 1015 n.42 (noting that four cases have gone to full trial on the merits: *Mixon v. Grinker*, 595 N.Y.S.2d 876 (Sup. Ct. 1993); *Jiggetts v. Grinker*, 553 N.E.2d 570 (N.Y. 1990); *Dinkins v. Perales*, Index No. 1457/82 (Sup. Ct. Alb. Co. 1982); *Anderson v. Perales*, 91 Civ. No. 1294 (N.D.N.Y. 1991)). Rather, they usually result in court-monitored settlements. See, e.g., Consent Decree, *Callahan v. Carey*, Index No. 42582/79 (Sup. Ct. N.Y. Co. Aug. 1981); Stipulation of Settlement, *Wilder v. Bernstein*, 78 Civ. 957 (S.D.N.Y. Aug. 27, 1985); Stipulation and Order, *McCain v. Koch*, Index No. 41023/83 (Sup. Ct. N.Y. Co. June 1, 1990).

121. The concern over the possibility of false positives and the sanctions that could be imposed as a result are usually addressed by pointing to the adequacy of post-test appeals processes, which are addressed as due process issues. As one expert in addiction and alcohol studies noted, "[b]ecause detection limits are so low in most lab analyses, even second-hand exposure can produce a positive." Correspondence with Dr. Frederick Rotgers, Center for Alcohol Studies, Rutgers University, Director, Program for Addiction Consultation and Treatment at St. Peter's Medical Center (Jan. 11, 1997) (on file with the *Buffalo Law Review*). Rotgers described a situation in which a dentist who was up for review before a state licensing board took a drug test and tested positive for cocaine, which he disavowed ever using. What became apparent in the subsequent hearing was that the dentist's girlfriend,

unbeknownst to him, had snorted cocaine several times during an evening they spent together and rubbed the residue on her gums (a common practice). They then engaged in heavy petting and oral sex. [The] next day he gave a urine specimen which was positive. In his hearing before the Board of Dentistry, Dr. John Morgan, professor of pharmacology at CUNY Medical School, testified that while the typical line of coke contains 30-50 mg [of the drug] (which is about the threshold range to produce a clear psychoactive effect—a "high") studies have been done in which volunteers who drank coca tea which delivers 2-4 mg. of cocaine per cup (enough to give the "kick" of a strong cup of coffee or a bottle of "jolt" cola) tested positive [i]n the usual analyses with levels of cocaine more than 100 times the detection limit!

Id. False positives are common for a number of reasons in urine and blood testing, and may implicate an associational right under the First Amendment, as well. The argument would center around an individual's right to associate with drug users and his or her in-

Despite welfare reform rhetoric, *Goldberg* remains good law and will continue to govern the requirements of due process, ensuring the right to a fair hearing prior to termination of benefits.¹²² Notwithstanding statutory language to the contrary, the severity of denying subsistence benefits to a class of citizens unable to provide for their own food and shelter is undeniable. Justice Brennan's recognition of the implications of denial of public assistance remains persuasive:

[T]he crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee . . . or virtually anyone else whose governmental entitlements are ended—is that termination of aid . . . *may deprive an eligible recipient of the very means by which to live while he waits.*¹²³

ability to do so for fear of testing positive for drugs. Perhaps an amusing example of this idea is the case of the Canadian gold-medal snowboarder, Ross Rebagliati. Rebagliati appealed a decision of the International Olympic Committee stripping him of his gold medal in the 1998 Games in Nagano, Japan after he tested positive for marijuana in a post-race drug test. Maintaining that he tested positive due to second-hand smoke from friends at a send-off party before the Games, Rebagliati stated: "I'm not going to change my friends [although] I might have to wear a gas mask around them from now on." *Canadian Vows to Don Gas Mask Near Dope-Smoking Friends*, 1998 AAP Information Services, Feb. 13, 1998, available in LEXIS Curnws File.

Several commentators have examined the possibility of imposing tort liability on laboratories for false positives. Manfield, *supra* note 4; Scott P. Callahan, Note, 38 S. TEX. L. REV. 823 (1997) (analyzing *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347 (Tex. 1995) which held that there is "no duty to warn" that certain substances can cause false positives). See also *Santiago v. Greyhound Bus Lines, Inc.*, 956 F. Supp. 144 (N.D.N.Y. 1997).

Drug testing through hair samples, most frequently by the use of Radioimmunoassay of hair (RIAH), poses unique problems for persons of African descent. Studies have shown a higher degree of false positives for drugs found in the hair samples of persons of African descent. See KENT HOLTORF, UR-INE TROUBLE 80-82 (1997). The difference in detection is attributable to the amount of melanin in the hair of different ethnic groups and melanin's ability to bind drugs. *Id.* at 81. Holtorf cites studies published in the *Journal of Analytical Toxicology* and the *Journal of Forensic Science*, and quotes an official from the National Institute on Drug Abuse: "Differences greater than 50 fold were observed in cocaine binding to Africoid male hair compared with blonde, female caucasoid hair specimens." *Id.* at 80. For a detailed bibliography of hair testing, see Arthur McBay, *Hair Drug Testing Bibliography*, 1 INT'L J. OF DRUG TESTING (Univ. of S. Fla. at St. Petersburg) (Fall 1996), Feb. 24, 1998, <<http://www.big.stpt.usf.edu/~journal/mcbay2.html>> (on file with the *Buffalo Law Review*).

122. But see Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996) (arguing that the Supreme Court is retreating from *Goldberg* and its progeny).

123. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (emphasis in original).

C. Federal Equal Protection

The Fourteenth Amendment provides that state governments shall not deny any person equal protection of the laws. Preliminary to determination of an equal protection violation is a "finding of governmental action undertaken with an intent to discriminate against a particular individual or class of individuals."¹²⁴ Classifications and separations of people are subject to scrutiny, but in varying degrees. The Supreme Court has developed three levels of judicial review for deciding equal protection claims: strict scrutiny,¹²⁵ rational basis review,¹²⁶ and an intermediate level of review. When a "suspect" class—one based on race or ethnic heritage¹²⁷—is treated differently in the eyes of the law, (that is, classified for the purposes of fines, punishment, or privileges), the differential treatment is presumptively invalid and the court looks at the classification with strict scrutiny. Strict scrutiny is also applied when the classification involves a fundamental right.¹²⁸ Strict scrutiny requires that the state show that its classification serves a "compelling state interest." Quasi-suspect status is afforded classifications based on gender and illegitimacy and invokes intermediate scrutiny.¹²⁹ Under this intermediate level of scrutiny, the state must show that the "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."¹³⁰

Traditionally, courts have refused to recognize poverty or

124. *Joyce v. San Francisco*, 846 F. Supp. 843, 858 (1994) (citing *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979)).

125. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

126. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

127. Only race and ethnic heritage have been definitively recognized as suspect classifications. See *Brown v. Board of Ed.*, 347 U.S. 483, 493 (1954); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Sugarman v. Dougall*, 413 U.S. 634, 646-48 (1973).

128. Fundamental rights include those specifically guaranteed by the Bill of Rights, such as freedom of speech, freedom of interstate migration, and, most important to the instant analysis, the right to be free from unreasonable searches, and those rights not mentioned in the Constitution, but presumably inherent. See John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

129. *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (indicating that sex should not be part of the "narrowly limited group of classifications which are inherently suspect.") (Powell, J., concurring); *Craig v. Boren*, 429 U.S. 190, 204 (1976) (gender); *Levy v. Louisiana*, 391 U.S. 68 (1968) (illegitimacy); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 109 (1973) ("illegitimate" children) (Marshall, J., dissenting); *Plyler v. Doe*, 457 U.S. 202 (1982) (children of illegal immigrants).

130. *Craig*, 429 U.S. at 197.

any economic-class-based distinction as suspect,¹³¹ including homelessness.¹³² However, a class of welfare recipients is a "disfavored" class, not because of its economic status vis-à-vis the "working" population, but because of the stigma that attaches to the status of welfare recipient.¹³³ The status of "homelessness" can also be considered disfavored for its lack of political power—someone without an address has no identifiable geographic representative in the government.¹³⁴

131. *Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450 (1988) ("We have previously rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny.") (citing *Harris v. McRae*, 448 U.S. 297, 322-23 (1980) (poverty standing alone not a suspect classification)); *Maher v. Roe*, 432 U.S. 464, 470-71 (1977); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973); *Lindsey v. Normet*, 405 U.S. 56 (1972); but see *Opinion of Justices*, 624 So.2d 107 (Ala. 1993); *Pinto v. Alabama Coalition for Equity*, 662 So.2d 894 (Ala. 1995); *Ex parte James*, 1997 Ala. LEXIS 16 (Ala. Jan. 10, 1997) (dealing with inequitable school funding in areas with different tax bases, ordering remedial measures to equalize educational resources based on equal protection clause in Alabama Constitution). See Holly Kurtz, *School Funding Equation Hard to Solve*, MONTGOMERY ADVERTISER, Jan. 15, 1997, at A14 (discussing court order in *Ex parte James*). See also Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996). Malamud argues that there is a trend towards class-based affirmative action in lieu of politically precarious race-based affirmative action, and that the Supreme Court's decision in *Adarand Const., Inc. v. Peña*, 515 U.S. 200 (1995) bolsters what has become a "conservative war cry." Malamud, *supra*, at 1847. Malamud noted the "failed efforts of advocates of welfare rights to achieve recognition of the poor as a 'suspect class' under the Equal Protection Clause," but maintained that the decision in *Adarand* is a step towards that recognition. *Id.* at 1848 n.6.

132. *D'Agunno v. Gallagher*, 50 F.3d 877, 879 n.2 (11th Cir. 1995); *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1269 n.36 (3d Cir. 1992); *Davison v. City of Tucson*, 924 F. Supp. 989, 993 (D.C. Ariz. 1996). See generally Wes Daniels, "Derelicts," *Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687 (1997) (discussing treatment of the rights of the homeless to subsistence benefits and housing).

133. See, e.g., *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 393 (Cal. Ct. App. 1994), superseded by 872 P.2d 559 (1994), rev'd 892 P.2d 1145 (1995); *Church v. Huntsville*, Civ. A. No. 93-C-1239-S, 1993 WL 646401 (N.D. Ala. Sept. 23, 1993); *Pottinger v. Miami*, 810 F. Supp. 1551, 1578 (1992). The *Pottinger* court noted that it was not entirely convinced that homelessness as a class has none of [the] "traditional indicia of suspectness." It can be argued that the homeless are saddled with such disabilities, or have been subjected to a history of unequal treatment or are so politically powerless that extraordinary protection of the homeless as a class is warranted.

Id. However, the court found it unnecessary to make that determination and granted the homeless plaintiffs' motion for an injunction against the city based on the city's infringement of their right to travel. *Id.* But see *Joyce v. San Francisco*, 846 F. Supp. 843, 857 (1994) ("homelessness" not a status because "status cannot be defined as a function of the discretionary acts of others").

134. Some have called this the "State of Homelessness" argument. See Trial Tran-

To garner status as a "disfavored class," a group must show that it has: "(1) . . . suffered some moderate discriminatory treatment and is politically powerless, (2) the classification stereotypes in a fashion that inaccurately portrays the group's abilities, or (3) the group possesses a personal trait over which it has no control."¹³⁵ Even if a court were to view a class of welfare recipients as a "disfavored class," increased scrutiny does not ensure victory, it just makes it more difficult for the government to prove that its interests supersede those of the recipient.¹³⁶

Plyler v. Doe is instructive in this context insofar as it extends a "disfavored class" status, thereby applying a strict scrutiny analysis, on a group of children of illegal immigrants.¹³⁷ In *Plyler*, the Court invalidated a plan to deny public education to the children of illegal immigrants. The Court based its decision on the fact that the children involved were members of an underclass and that they were the innocent victims of their parents' illegal conduct.¹³⁸ *Plyler* arguably stands as the only time the Court has granted disfavored class status to a group based on its position in society,¹³⁹ and its holding bolsters an argument

script, *United States v. Carey*, Crim. No. M-9066-96 (Jan. 3, 1997) (on file with the District of Columbia Superior Court). Representative John Lewis (D-GA) introduced H.R. 74, Voting Rights of Homeless Citizens Act of 1997, on Jan. 7, 1997. The Act would "enable the homeless . . . to vote. The bill would remove the legal and administrative barriers that inhibit them from exercising this right . . . [I]n many states, the homeless are left out and left behind." 143 CONG. REC. E37 (remarks of Rep. John Lewis).

135. Guthrie, *supra* note 14, at 594 n.111 (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-33 (1988)).

136. Likewise, rationality review does not dictate a holding in favor of the government action. See *Romer v. Evans*, 116 S. Ct. 1620 (1996) (striking down a Colorado Constitutional amendment denying protected class status to gay, lesbian, and bisexual persons on rational basis review).

137. 457 U.S. 202 (1982). In addition, the Court's action flew in the face of strong anti-immigrant rhetoric, in much the same way that a successful challenge to a drug testing scheme might fly in the face of anti-drug rhetoric. The force of *Plyler* was diluted in a later case in which the Court noted that the *Plyler* holding was restricted to the "unique circumstances" that gave rise to a "unique confluence of theories and rationales." *Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450, 459 (1988) (quoting *Plyler*, 457 U.S. at 239, 243); See also *Philadelphia Police & Fire Ass'n v. City of Philadelphia*, 874 F.2d 156, 165 (3d Cir. 1989) (rejecting district court's application of *Plyler* to justify heightened scrutiny in denial of access to education); *Catlin v. Sobol*, 881 F. Supp. 789 (N.D.N.Y. 1995) (criticizing *Plyler*).

138. Applying strict scrutiny based on the children's disfavored class status was a stretch, but ultimately the Court's sympathy for the children and the importance of education may have had more force than an argument about "classification."

139. Though some argue that the children's status as "illegal aliens" was a condition of birth, not situational. See, e.g., Audra Behne, *Balancing the Adoption Triangle: the State, the Adoptive Parents and the Birth Parents—Where Does the Adoptee Fit In?*, 15 IN THE PUB. INT. 49 (1997). Cf. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 109

against any plan which denies assistance to children based on the acts of their parents. While states have been careful to carve out the sanctions, preserving the children's benefits via payment to a third party or restricting the sanction to a denial of cash benefits, the impact on a child in a family with one sanctioned member will be severe. The entire family will be forced to "live on less."¹⁴⁰

*United States v. Armstrong*¹⁴¹ dealt a blow to equal protection claims. Although the case dealt directly with a selective prosecution challenge, it has larger implications for how the Court classifies individuals as "similarly situated." In *Armstrong*, five black men challenged their prosecution on the basis that they were selectively prosecuted for "crack" cocaine charges by introducing evidence that nearly one hundred percent of all crack prosecutions in their jurisdiction, which carry a heavier sentence than those levied for offenses involving powder cocaine,¹⁴² were of black men.¹⁴³ The plaintiffs in that case were merely asking for the prosecution to turn over certain documents to help them demonstrate their "selective prosecution" claim. In response, the Court held that "[f]or a defendant to be entitled to discovery on a claim that he was singled out for prosecution on the basis of his race, he must make a threshold

(1973) (Marshall, J., dissenting) ("[I]llegitimacy has long been stigmatized by our society. Hence, discrimination on the basis of birth—particularly when it affects innocent children—warrants special judicial consideration.").

140. See MAKING WELFARE REFORM WORK, *supra* note 11, at 54; see also *Punishment of Drug Offenders*, *supra* note 12, at 988 n.11.

141. 116 S. Ct. 1480 (1996); see also *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo.) (crack sentence unconstitutional on equal protection grounds), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

142. The so-called "crack statute," 21 U.S.C. 841(b)(1)(A)(iii) (1993), mandates a penalty 100 times more harsh for possessors of crack than possessors of powder cocaine. Jason A. Gillmer, Note, *United States v. Clary: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497, 501 (1995) (comprehensive analysis of racial discrimination in drug sentencing, the crack statute, and equal protection).

Section 841(b)(1)(A)(iii) provides that any person convicted of possession with intent to distribute '50 grams or more of a mixture or substance . . . which contains [crack]' shall be sentenced to no less than 10 years in prison. The same penalty, under 21 U.S.C. 841(b)(1)(A)(ii)(II) is imposed on a person possessing 5000 grams or more of cocaine powder.

Id. at 501 n.18. See also Troy Duster, *Pattern, Purpose, and Race in the Drug War: The Crisis of Credibility in Criminal Justice*, in CRACK IN AMERICA, *supra* note 23, at 260. See also *supra* note 37 and accompanying text (discussing crack sentencing disparity).

143. "[N]ationally, close to ninety percent of the defendants convicted for federal crack violations have been black, while only about four percent have been white." Gillmer, *supra* note 142, at 501 (citing studies). See also Duster, *supra* note 142, at 265-66.

showing that the Government declined to prosecute similarly situated suspects of other races."¹⁴⁴ In that case, the Court defined "similarly situated" narrowly by requiring a showing that the government declined to prosecute white men for similar crack cocaine offenses. For a welfare recipient to challenge a drug testing scheme based on equal protection, the recipient would have to show that he or she is similarly situated to a person not receiving public assistance. *Armstrong* indicates that the Court chose a narrow view of what makes a group of people similarly situated.

Ultimately, an equal protection claim will focus on whether the drug testing plan exposes only the poor to the indignities of the test.¹⁴⁵ A federal claim of an equal protection violation would have to defeat the threshold argument that receipt of cash assistance is no longer an entitlement. If the poor do not want to face such an indignity, they can choose to eschew the benefit. Documentary and testimonial evidence will demonstrate that the argument is not so simple. Cash benefits are not a simple choice since they constitute a means of subsistence. Basing a challenge on a state-created entitlement to public assistance is more likely to be successful.¹⁴⁶

D. Statutory Challenge

The Americans with Disabilities Act of 1990 (ADA)¹⁴⁷ provides broad protections for individuals with disabilities. It prohibits "discriminat[ion] against a qualified individual with a disability because of the disability of such individual."¹⁴⁸ The term "qualified individual with a disability," however, does "not include [an individual] who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."¹⁴⁹ The ADA does protect those who either participate in or have successfully completed a supervised drug rehabilitation program and are no longer engaging in illegal drug use.¹⁵⁰

The ADA allows for the "adopt[ion] or administ[r]ation of] reasonable policies or procedures, including but not limited to

144. *Armstrong*, 116 S. Ct. at 1482.

145. This claim can be undercut by the burgeoning number of private employers who require prospective employees to undergo drug testing. See *supra* notes 15-19 (prevalence of drug testing in the private sector).

146. See *supra* Part II.

147. 42 U.S.C. § 12101 *et seq.* (1994).

148. *Id.* § 12112(a).

149. *Id.* § 12114(a).

150. *Id.* § 12114(b).

drug testing,¹⁵¹ and it does not prohibit requiring those with a history of addiction to "submit to more frequent testing than other employees."¹⁵² There are several possible ways to utilize the protections of the ADA in this context. With regard to disclosure of drug use, several recent cases have dealt with whether an employer can require an employee to disclose information about medication they are currently taking.¹⁵³ In 1995 a San Francisco District Court Judge found that subjecting welfare recipients to a written drug screen violated the ADA.¹⁵⁴

Although the protections of the ADA do not extend to *current* users of illegal drugs, recent court decisions widen the door for such users.¹⁵⁵ Some have suggested that the provisions in the PRA may themselves contradict the ADA.¹⁵⁶ Because the ADA is relatively new legislation, and caselaw is surprisingly scant, there are wide discrepancies about the breadth of its protection in this area.¹⁵⁷

151. *Id.*

152. See *Buckley v. Consolidated Edison Co. of N.Y., Inc.*, No. 96-9039, 1997 U.S. App. LEXIS 27631, at *10-11 (2d Cir. Oct. 8, 1997).

153. See, e.g., *Roe v. Cheyenne Mountain Conference Resort*, 920 F. Supp. 1153 (D. Colo. 1996), modified 124 F.3d 1221 (10th Cir. 1997).

154. See *Recent Drug Testing News*, Mar. 10, 1997, <<http://www.passdrugs.com/drugtestinfo.html>> (spot: san) (on file with the *Buffalo Law Review*) (court in *Hunsaker v. County of Contra Costa* held that use of SASSI drug screening assessment device violated ADA); see also *Hunsaker v. County of Contra Costa*, No. C-95-1082 mmc, 1997 Westlaw 835164 (N.D. Cal. July 31, 1997) (order granting permanent injunctive relief enjoining county from using SASSI results as a basis for further evaluation).

155. See, e.g., *McDaniel v. Mississippi Baptist Medical Center*, 869 F. Supp. 445 (S.D. Miss. 1994) ("safe harbor" created by ADA § 12114(b) restores protection to drug users who stop engaging in illegal drug use or enter or complete drug rehabilitation); *Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995), cert. denied, 116 S. Ct. 711 (1996) (questioning determination of "recent use," considering drug-related misconduct as standard); *Baustian v. Louisiana*, 910 F. Supp. 274 (E.D. La. 1995) (seven weeks clean not long enough to overcome "current use"); *Starr v. Delta Air Lines, Inc.*, Appeal No. C-950217, 1995 Ohio App. LEXIS 5778 (Hamilton Co., Ohio Dec. 29, 1995) (23 days not long enough).

156. See Booth, *supra* note 73.

157. One attorney with the National Persons with Disabilities Law Center in Atlanta, Georgia, has argued for innovative uses of the ADA to broaden its protections. Stephen G. Weizenecker, *Federal Statutes and Harm Reduction: Methods To Protect Drug Users From Unlawful Discrimination*, Presentation at The First National Harm Reduction Conference in Oakland, California (Sept. 19, 1996) (transcript available from the Harm Reduction Coalition). But see Jonathan R. Mook & Erin E. Powell, *Substance Abuse and the ADA: What Every Employer Should Know*, EMPLOYEE RELATIONS L.J., Autumn 1996, at 57.

E. Unconstitutional Conditions

The doctrine of unconstitutional conditions holds that the government cannot condition the receipt of a benefit on the relinquishment of a constitutional right.¹⁵⁸ The Supreme Court has reaffirmed this doctrine time and again in a line of cases since 1931,¹⁵⁹ broken only by *Wyman v. James*,¹⁶⁰ a 1971 case in which the Court rejected a challenge, similar to the one suggested here, to a welfare regulation. The *Wyman* Court ruled against a welfare recipient who argued that the doctrine of unconstitutional conditions barred the state's practice of conditioning her receipt of welfare on her submission to home visits by a caseworker. The Court rejected her Fourth Amendment-based challenge holding that "there [was] no search involved in th[e] case; that even if there were a search, it would not be unreasonable; and that even if [it] were an unreasonable search, a welfare recipient waives her right to object by accepting benefits."¹⁶¹

Holding that home visits were not "searches" within the meaning of the Fourth Amendment because they were not born of criminal suspicion, nor did they result in criminal prosecution,¹⁶² the Court pointed to several factors which would negate

158. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972). Guthrie provided a comprehensive analysis of the likely success of an argument based on the doctrine of unconstitutional conditions. See Guthrie, *supra* note 14, at 598-602. Justice Sutherland defined the doctrine of unconstitutional conditions in 1931 as follows: "the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." *United States v. Chicago, M., St. P. & P. R. Co.*, 282 U.S. 311, 328-29 (1931).

159. See, e.g., *Chicago, M., St. P. & P.R. Co.*, 282 U.S. at 311; *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946); *Speiser v. Randall*, 357 U.S. 513 (1958); *Sherbert v. Verner*, 374 U.S. 398 (1963).

160. 400 U.S. 309 (1971).

161. *Id.* at 338 (Marshall, J., dissenting).

162. The Court acknowledged that home visits by welfare caseworkers could indeed result in criminal prosecution:

If the visitation serves to discourage misrepresentation or fraud, such a by-product of that visit does not impress upon the visit itself a dominant criminal investigative aspect. And if the visit should, by chance, lead to the discovery of fraud and a criminal prosecution should follow, then, even assuming that the evidence discovered upon the home visitation is admissible, an issue upon which we express no opinion, that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon another discovery by a citizen of criminal conduct.

Wyman, 400 U.S. at 323 (internal citations omitted). The Court also remarked that the home visit "does not deal with crime or with the actual or suspected perpetrators of the crime. The caseworker is not a sleuth but rather, we trust, is a friend to one in need." *Id.* The Court's holding with respect to this point is, again, a stark departure from that

a claim that the home visits were unreasonable, even if they were deemed a search. Among those facts were the public's interest in determining how the "public trust" was being used,¹⁶³ the goal of the regulation in promoting "assistance and rehabilitation," [and] maintaining and strengthening family life,"¹⁶⁴ concern about the "possible exploitation of [children],"¹⁶⁵ the fact that recipients receive "written notice several days in advance of the intended home visit,"¹⁶⁶ and that the regulation was not related to criminal law enforcement.¹⁶⁷

Turning to the question of whether a welfare recipient's right are even implicated in such a search, the Court held that "visitation in itself is not forced or compelled,"¹⁶⁸ and that the welfare recipient "had the 'right' to refuse the home visit, but a consequence in the form of cessation of aid . . . flows from that refusal. The choice," the Court reasoned, "is entirely hers, and nothing of constitutional magnitude is involved."¹⁶⁹

Like the challenged regulation in *Wyman*, a requirement that welfare recipients submit to drug testing imposes as a condition for receipt of welfare the relinquishment of the protections of the Fourth Amendment. However, both because *Wyman* has never been reaffirmed and because drug tests have unequivocally been deemed searches within the meaning of the Fourth Amendment, *Wyman* will not likely pose a significant obstacle to a challenge to a drug testing statute or regulation in the context of welfare administration. However, while a challenge is likely to pass easily through *Wyman's* determination that administra-

line of cases which subject administrative searches to the strictures of the Fourth Amendment. See *id.* at 331 (Douglas, J., dissenting) (citing *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967)). See also *infra* notes 175 and 176 and accompanying text (discussing administrative searches as searches within the meaning of the Fourth Amendment).

163. *Wyman*, 400 U.S. at 318-19.

164. *Id.* at 319.

165. *Id.*

166. *Id.* at 320.

167. *Id.* at 322-23.

168. *Id.* at 317.

169. *Id.* at 324. The dissent took the majority to task for its blunt refusal to acknowledge the reality of what was at stake for the welfare recipient. Justice Douglas argued that

[t]he penalty here is not, of course, invasion of the privacy of [the welfare recipient], only her loss of federal or state largesse. That, however, is merely rephrasing the problem. Whatever the semantics, the central question is whether the government by force of its largesse has the power to 'buy up' rights guaranteed by the Constitution.

Id. at 327-28 (Douglas, J., dissenting).

tive searches in the welfare context are not within the contemplation of the Fourth Amendment and that an applicant or recipient waives his or her right upon receipt of the benefit, the inquiry will be whether a drug test is a "reasonable" search, an analysis undertaken in a traditional examination of a Fourth Amendment violation.

F. *The Fourth Amendment*

The Supreme Court has consistently held that drug testing is a search contemplated by the Fourth Amendment. Having ruled on five drug testing cases in the past decade, the Court has upheld drug testing schemes involving public employees in safety and security situations and student athletes; and struck down a Georgia law requiring drug testing of candidates for public office.¹⁷⁰

Following the signing of President Ronald Reagan's Executive Order entitled "Drug-Free Federal Workplaces," in September of 1986,¹⁷¹ both the Federal Railroad Administration (FRA) and the Customs Service instituted drug testing plans for their employees. Those employees subsequently challenged the regulations, and the standards and factors articulated by the court in the 1989 twin cases, *Skinner* and *Von Raab*,¹⁷² upholding the regulations, lay out the framework for subsequent challenges to drug testing plans.¹⁷³ The Supreme Court utilized that framework in *Vernonia School District No. 47J v. Acton*, which upheld a drug testing scheme for student athletes.¹⁷⁴ The strong dissent authored by Justice Scalia in *Von Raab*'s 5-4 decision, Justice O'Connor's dissent in *Vernonia*, and the Supreme Court's recent decision in *Chandler v. Miller* striking down a Georgia statute

170. As this comment went to press, the Supreme Court let stand a 1997 Federal District Court decision which held constitutional "a random drug-program for Executive Branch employees who work next to the White House in the Old Executive Office Building." Linda Greenhouse, *Supreme Court Will consider Arbitration's Role at Work*, N.Y. TIMES, Mar. 3, 1998, at A14 (reporting on *Stigile v. Clinton*, No. 97-837); see *Stigile v. Clinton*, 110 F.3d 801 (D.C. Cir. 1997), cert. denied, 66 U.S.L.W. 3575 (U.S. Mar. 3, 1998).

171. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986), reprinted in 5 U.S.C. § 7301 note.

172. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

173. See Guthrie, *supra* note 14, at 587. The composition of the Supreme Court has changed since *Skinner* and *Von Raab*, as well, and the strong dissent that would have found the testing in *Von Raab* unconstitutional is likely to be joined by some of the newer justices, or some of the majority given a different set of facts. For a fuller discussion of this point, see *infra* Part III.F.6.

174. *Vernonia School Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995).

which required that candidates for public office submit to drug testing, provide insight into the direction the Court is likely to take in the context of a welfare-based challenge.

1. *Skinner and Von Raab*. Before undertaking an analysis of whether a drug testing plan violates the Fourth Amendment, a preliminary inquiry must be made to determine whether the Amendment even applies. Generally associated with the protection of the Fourth Amendment is the traditional police search of a car or a home, that is, a search in the context of a criminal investigation. Drug testing by the government, especially where the results of such a test are not used in a criminal prosecution and are undertaken, as here, by the department of social services, have been called "administrative searches."¹⁷⁵ Administrative searches of both homes and businesses have been held subject to the strictures of the Fourth Amendment.¹⁷⁶ In addition, bodily privacy,¹⁷⁷ while not an enumerated right found in the

175. STEPHEN A. SALTZBURG & D.J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 282 (4th ed. 1992).

176. See *Camara v. Municipal Court*, 387 U.S. 523 (1967); See *v. City of Seattle*, 387 U.S. 541 (1967).

177. While there are certainly degrees of invasiveness involved in any drug test—from a blood test (a high level of intrusion one Supreme Court justice characterized as "forcible bloodletting," *Schmerber v. California*, 384 U.S. 757, 779 (1966)) to directly-observed urinalysis (where someone actually watches the subject urinate) to an unobserved urinalysis—I argue in this Comment that the taking of, observation of, and analysis of bodily fluids by any means implicates a privacy right. Sweat patches and hair analysis drug testing procedures do not change my analysis, as they both invade bodily privacy. For more information about sweat patches, see *Cole*, *supra* note 16. For more information about hair analysis, see Prepared Testimony by Raymond C. Kubacki, Jr., Pres. and CEO on Behalf of Psychomedics Corp. Before the House Committee on Commerce Subcommittee on Oversight and Investigations: The PDT-90 Personal Drug Testing Service, *Federal News Services* (Sept. 26, 1996). See also *supra* note 121 and accompanying text (discussing racial disparities in hair analysis drug testing).

There are two levels to intrusiveness when thinking about a drug test—one is the obvious argument of the indignity of the test, which may be weakened by the use of a sweat patch or hair testing. The other, however, deals with the *idea* of the drug test itself—the fact that the government or your employer can monitor what you do to your own body, the presumption of wrongdoing that accompanies being subjected to a drug test, and the existential argument that each of us has an inherent right to administer self-medication, to break the law, if you will, and choose to suffer the consequences. See *Thomas Szasz, Our Right to Drugs* 112-13 (1992). See also Cornelius Nestler, *Constitutional Principles, Criminal Law Principles and the German Drug Law*, 1 *BUFF. CRIM. L. REV.* (forthcoming 1998). But as citizens, our expectation is in taking the risk of breaking the law and being caught by traditional law enforcement methods. As Justice O'Connor argues, see *infra* Part III.F.4, methods of law enforcement that are sure to snare criminal activity may not always be constitutional though the snaring may be desirable.

text of the Constitution, falls within what Justice Douglas first called the "penumbra" of rights granted by the Constitution.¹⁷⁸ The right of privacy has also been interpreted as the "right to be let alone."¹⁷⁹

The first level of inquiry is to determine whether a search has occurred within the meaning of the Fourth Amendment, by asking: (1) who conducted the search and (2) did the subject upon whom the search was conducted have an actual or reasonable expectation of privacy?¹⁸⁰ Once the Fourth Amendment is triggered, the inquiry turns to whether a warrant was necessary to effect the search,¹⁸¹ whether there was probable cause to establish the need for the search,¹⁸² and whether the search was reasonable.¹⁸³

The Fourth Amendment applies to searches conducted by the government and to "private part[ies] act[ing] as an instrument or agent of the Government."¹⁸⁴ In *Skinner*, the Railway Labor Executives' Association and its member labor organizations challenged regulations promulgated by the Federal Railroad Administration (FRA) pursuant to the Federal Railroad Safety Act of 1970,¹⁸⁵ which require testing of railroad employees following accidents, and authorize testing of employees following safety rule infractions.¹⁸⁶ Countering the argument by

178. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (1st Amendment freedom of association protects privacy from government intrusion); *Bates v. Little Rock*, 361 U.S. 516 (1960) (compelling state interest needed to justify intrusion on personal liberty); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (means of intrusion on personal liberty must be necessary for accomplishment of permissible policy).

179. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (1888)).

180. See *Katz v. United States*, 389 U.S. 347, 351 (1967).

181. U.S. CONST. amend IV: "no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Warrants protect citizens against random and arbitrary acts of the government by ensuring an objective determination for the need of an intrusion made by a neutral and detached magistrate. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621-22 (1989).

182. U.S. CONST. amend IV.

183. *Id.* ("The right of the people to be secure . . . against unreasonable searches . . ."); see *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (Fourth Amendment does not proscribe all searches, only those that are unreasonable).

184. *Skinner*, 489 U.S. at 614 (collecting cases).

185. Law of Oct. 16, 1970, ch. 13, 84 Stat. 971, *repealed by* Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (1994).

186. See *Skinner*, 489 U.S. at 606.

the Secretary of Transportation that private railroads implementing drug and alcohol testing procedures were not acting as state agents, the Court held that "[w]hether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities."¹⁸⁷ Citing the Government's enactment of legislation directing the Secretary of Transportation to promulgate such regulations as "clear indic[ia] of [its] encouragement, endorsement, and participation" in the FRA testing scheme, the Court found that the Fourth Amendment was implicated.¹⁸⁸

Turning to whether railroad employees had a "reasonable expectation of privacy" against a drug or alcohol test, the Court pointed to the fact that it has "long recognized that a 'compelled intrusio[n] into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search."¹⁸⁹ Further, the Court added that "it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy."¹⁹⁰ While not a surgical intrusion like the search in *Schmerber v. California*, the Court found persuasive the fact that the testing procedures in *Skinner* could "reveal a host of private medical facts about an employee."¹⁹¹ Additionally persuasive was the process of collecting the sample to be tested, which consisted of "visual or aural monitoring of the act of urination, itself implicat[ing a] privacy interest[]."¹⁹²

The Court dispensed with both the warrant requirement of the Fourth Amendment and the need for probable cause by relying on the "special needs" doctrine. An exception to the warrant requirement exists "when 'special needs,' beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."¹⁹³ Addressing probable cause, the Court found that "[w]hen the balance of interests precludes insistence on a showing of probable cause . . . 'some quantum of

187. *Id.* at 614.

188. *Id.* at 615-16.

189. *Id.* at 616 (quoting *Schmerber*, 384 U.S. at 767-68).

190. *Id.*

191. *Id.* at 617.

192. *Id.*

193. *Id.* at 619 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)). The "need" identified here is the government's interest in "regulating the conduct of railroad employees to ensure safety." *Id.* at 620.

individualized suspicion' is necessary for a search to be reasonable.¹⁹⁴ However, "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable,"¹⁹⁵ the Court determined, imposing a balancing test: "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."¹⁹⁶

Weighing the privacy interests of the railroad employees against the government's interest in maintaining safe rail travel, the Court found that the privacy interests of the employees were diminished by the fact that they regularly had to undergo tests as part of physical exams and that they were employed in a highly-regulated industry.¹⁹⁷ Additionally, the Court found the intrusiveness of the tests were minimal, revealing only the presence of alcohol or controlled substances, neither of which the employee has a legitimate privacy interest.¹⁹⁸

Balanced against these diminished interests were the likelihood of great loss of human life and the fact that drug use or impairment are not otherwise detectable on employees over whom there is no constant and direct supervision.¹⁹⁹ The Court reasoned that "[e]mployees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."²⁰⁰ The Court therefore found a nexus between the human loss and the need for the challenged activity. In other words, it found that the remedy chosen by the government in this case did indeed address the problem it sought to counter.

Performing a similar analysis in *Skinner's* companion case, *National Treasury Employees Union v. Von Raab*, the Court upheld a drug testing scheme for customs employees who were either directly involved in drug interdiction or the enforcement of related laws or required to carry firearms or handle classified materials. Again, basing its determination on the special needs doctrine, the court found the random, suspicionless testing con-

194. *Id.* at 624 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976)).

195. *Id.*

196. *Id.*

197. *See id.* at 627 & 628 n.8.

198. *See id.* at 626-27.

199. *See id.* at 628.

200. *Id.*

ducted by the United States Customs Service constitutional.²⁰¹ In this case, the nexus between the harm to be avoided, corruption of the integrity of the Nation's borders, and the means by which the government sought to avoid the harm, drug testing Customs employees, was not so clear.²⁰²

2. *The dissent in Von Raab.* Justice Scalia, who joined the majority in *Skinner*, dissented in *Von Raab*. The focus and tone of his dissent, and the fact that he joined the majority in upholding the drug testing scheme in *Vernonia*, is significant because Scalia is one of the Court's staunchest conservatives; his decision in a future challenge in the welfare context is crucial to reaching a majority of the Court.²⁰³

Focusing on the lack of supporting data, Scalia wrote that "[t]he Court's opinion [in *Von Raab*] will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees."²⁰⁴ Scalia was persuaded in *Skinner* by hard statistics which established the existence of a problem, and was troubled by the fact that the only "plausible points" raised by the government in *Von Raab* were "supported by nothing but speculation, and not very plausible speculation at that."²⁰⁵ He added that "dispositively absent" in the Government's justifications was "the recitation of even a single instance in which any of the speculated horrors actually occurred."²⁰⁶

Justice Scalia pointed to the majority's rhetoric, highlighting its reliance on such circular platitudes invoked to justify the testing of customs officials as: "The Customs Services is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population."²⁰⁷ He also unwound the tenuous connection between the undocumented problem and the harms cited by the government likely to result: bribery of officials, temptation, exposure to drugs, and sympathy

201. *Von Raab*, 489 U.S. at 679.

202. See *id.* at 681 (Scalia, J., dissenting).

203. For an intriguing look at Justice Scalia and his seemingly incongruous vote in *Von Raab* and many criminal procedure cases, see George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990). See also Christopher E. Smith, *Justice Antonin Scalia and Criminal Justice Cases*, 81 KY. L.J. 187 (1992).

204. *Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting).

205. *Id.* at 682. (Scalia, J., dissenting). Scalia notes that none of the possible scenarios of corruption introduced by the Government were plausible, except in a case where addiction was so severe as to impair the judgment of the Customs official to the point that "it would be detectable even without benefit of a urine test." *Id.*

206. *Id.* at 683.

207. *Id.* at 682.

of border officials for smugglers. Of this, Scalia writes: "all this contains much that is obviously true, and much that is relevant; unfortunately, what is obviously true is not relevant, and what is relevant is obviously not true."²⁰⁸

Observing that the only plausible justification for the drug testing scheme in *Von Raab* was the one offered by the Commissioner of Customs—that the drug testing program set an example in this country's struggle with drugs, the "most serious threat to our national health and security,"²⁰⁹ Scalia remarked sardonically:

What better way to show that the Government is serious about its "war on drugs" than to subject its employees on the front line of that war to this invasion of their privacy and affront to their dignity? To be sure, there is only a slight chance that it will prevent some serious public harm resulting from Service employee drug use, but it will show to the world that the Service is "clean," and—most important of all—will demonstrate the determination of the Government to eliminate this scourge of our society. I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.²¹⁰

Justice Scalia was similarly concerned that private citizens would be subjected to urine testing, and noted: "there is no reason why this super-protection against harms arising from drug use must be limited to public employees; a law requiring similar testing of private citizens who use dangerous instruments such as guns or cars, or who have access to classified information, would also be constitutional."²¹¹ He concluded his dissent with a scathing commentary on the assault on the Fourth Amendment's protection of privacy:

Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us—who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.²¹²

208. *Id.*

209. *Id.* at 686 (quoting the Commissioner of Customs).

210. *Id.* at 686-87.

211. *Id.* at 686.

212. *Id.* at 687.

3. Vernonia. An Oregon high school plan to drug test high school athletes came before the Court in 1995 after seventh-grader James Acton and his family refused to submit to the test before football season. Acton filed suit against the school district claiming that the drug testing policy violated both the Fourth Amendment and Oregon's constitution.²¹³ The challenged plan was random and suspicionless; each week of the sports season ten percent of all student athletes would be randomly selected and tested.²¹⁴ The specimen for urinalysis was to be taken using limited visual and aural monitoring and sent to a laboratory for analysis for amphetamines, cocaine, and marijuana.²¹⁵ Athletes who tested positive were tested a second time, and if the second test produced a positive result, a meeting between the school and the parents was convened, and the student was given the option of submitting to weekly drug tests or being suspended from the sports program.²¹⁶ In analyzing the District's plan, the Court followed the *Skinner* and *Von Raab* framework, laying out the requirements for a Fourth Amendment claim, describing the Special Needs doctrine, applying it, and weighing the privacy interest, the level of intrusion, and government interest involved. Careful to distinguish this case from other contexts in which drug testing might arise, the Court based its decision largely on the privacy interest involved, holding that students have a diminished interest in privacy and diminished rights in general.²¹⁷ Student athletes in particular have a lesser expectation of privacy, the Court explained, because of the various other incursions on privacy student athletes must endure—from public showers to frequent medical examinations.²¹⁸ Central to the Court's decision was the nature of the relationship between the school district and the student athletes. The government had a responsibility "under a public school system, as guardian and

213. *Vernonia School Dist. 47J v. Acton*, 515 US 646, 648-51 (1995). See generally Jennifer L. Malin, Comment, *Vernonia School District 47J v. Acton: A Further Erosion of the Fourth Amendment*, 62 BROOK. L. REV. 469 (1996); Note, *A Casualty of the "War on Drugs": Mandatory, Suspicionless Drug Testing of Student Athletes in Vernonia School District 47J v. Acton*, 74 N.C.L. REV. 833 (1996); Joaquin G. Padilla, Comment, *Vernonia School District 47J v. Acton: Flushing the Fourth Amendment—Student Athlete's Privacy Interests Go Down the Drain*, 73 DENVER U. L. REV. 571 (1996); Michael D. Mosser, Note, *Random Drug Testing High School Student Athletes in Vernonia School District 47J v. Acton: Is the War on Drugs a Losing Battle for the Fourth Amendment?*, 17 WHITTIER L. REV. 527 (1996).

214. *Vernonia*, 515 U.S. at 650.

215. *Id.*

216. *Id.* at 651.

217. *Id.* at 657. See also *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

218. *Vernonia*, 515 U.S. at 657.

tutor of children entrusted to its care.”²¹⁹ In addition to this “guardianship” relationship, balanced against the students’ diminished interest in privacy, was a drug problem of “epidemic” proportions at the Oregon high school, demonstrated by the record.²²⁰ Justice Ginsberg concurred with the majority, but wrote separately to emphasize the choice students athletes had to eschew testing, and the relative severity of the sanction, which was simply a disqualification from intramural athletics.²²¹

4. *Vernonia’s dissent.* Justice O’Connor, joined by Justice Stevens and Justice Souter, authored the dissent in *Vernonia*, focusing on the plan’s lack of individualized suspicion. Detailing the history of the Fourth Amendment and the intent of the Framers to proscribe blanket searches and searches conducted on general warrant, she wrote:

[T]he individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy concerns. It may only be forsaken, our cases in the personal search context have established, if a suspicion-based regime would likely be ineffectual.²²²

O’Connor argued that the Court’s own view of suspicionless searches has generally been that they are unreasonable.²²³ In cases where such searches were upheld, the intrusion on privacy was minimal.²²⁴ O’Connor noted, “monitored urination combined with urine testing is more intrusive than some personal searches [and that] the collection and testing of urine is . . . a search of the person, one of only four categories of suspect searches the Constitution mentions by name.”²²⁵ Distinguishing *Vernonia* from *Skinner* and *Von Raab*, where “even one undetected instance of wrongdoing could have injurious consequences

219. *Id.* at 665.

220. *Id.* at 649.

221. *Id.* at 666 (Ginsberg, J., concurring). This is not the first time Justice Ginsberg’s opinion has focused on the severity of the outcome of a particular decision. See also *Bennis v. Michigan*, 116 S. Ct. 994, 1003 (1996) (Ginsberg, J., concurring).

222. *Vernonia*, 515 U.S. at 678 (O’Connor, J., dissenting).

223. See *id.* at 671-72 (citing *Ybarra v. Illinois*, 444 U.S. 85 (1979) in which the Court invalidated a patdown “sweep” for weapons of all patrons in a tavern where probable cause existed to believe drug dealing was taking place in the tavern).

224. *Id.* at 672 (citing *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990)) (“upholding the brief and easily avoidable detention, for purposes of observing signs of intoxication, of all motorists approaching a roadblock.”).

225. *Id.*

for a great number of people,"²²⁶ O'Connor found the district's policy an exaggerated response which casted too wide a net in its attempt to ferret out student athlete users.²²⁷ Justice O'Connor criticized the Court and the district for attempting to solve the problem of drug abuse by shunting the requirements of the Constitution, arguing that

a suspicion-based scheme . . . may not be as effective as a mass, suspicionless testing regime. In one sense, that is obviously true—just as it is obviously true that suspicion-based law enforcement is not as effective as mass, suspicionless enforcement might be. But there is nothing new in the realization that Fourth Amendment protections come with a price.²²⁸

More significantly, O'Connor sought to place into proper perspective the governmental need prong of the test used to justify an intrusive search. She wrote that

it remains the law that police cannot, say, subject to drug testing every person entering or leaving a certain drug ridden neighborhood in order to find evidence of crime . . . [a]nd this is true even though it is hard to think of a more compelling government interest than the need to fight the scourge of drugs on our streets and in our neighborhoods.²²⁹

5. *Chandler v. Miller*. On April 15, 1997, the Supreme Court struck down a Georgia statute that required candidates for public office in that state to submit to drug testing to certify that they are drug free.²³⁰ Stressing the fact that there are a "limited number of circumstances in which suspicionless searches are warranted," the Court found that the state's "certification requirement [was not] warranted by a special need."²³¹ Rejecting the state's arguments that a candidate's use of drugs (1) "draws into question an official's judgment and integrity," (2) "jeopardizes the discharges of public functions," and (3) "undermines public confidence and trust in elected officials," the Court chose to focus on the lack of any "concrete danger" to the public against which the Georgia law would protect.

226. *Id.* at 675.

227. In arguing the pervasiveness of the problem, O'Connor asserted that the district demonstrated its clear ability to flag problem students for suspicion-based testing. *Id.* at 678-79.

228. *Id.* at 680 (citing *Arizona v. Hicks*, 480 U.S. 321, 329 (1987) (internal quotation omitted)).

229. *Id.* at 673.

230. *Chandler v. Miller*, 117 S. Ct. 1295 (1997).

231. *Id.* at 1303.

Instead of concrete danger, what the law was designed to protect, and what the Court found at stake, was Georgia's image: the "display [of] its commitment to the struggle against drug abuse."²³² Writing for the majority, Justice Ginsburg wrote that "[w]here the risk to public safety is substantial and real blanket, suspicionless searches calibrated to the risk may rank as 'reasonable' . . . where public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."²³³

6. *Success of a Challenge to Drug Testing in a Welfare Context.* Much of the analysis presented here has dealt with random and suspicionless drug testing. Challenge levied against such plans will focus on overbreadth and the nature of the governmental interest at stake. The Special Needs doctrine used by the court in *Skinner* and *Von Raab* instructs that random and suspicionless drug testing is permissible as long as a strong government interest outweighs the implicated privacy interest and, as implied in *Skinner*, the nexus between the harm to be avoided and the means for avoiding the harm is sufficiently strong. The *Chandler* decision significantly narrowed the circumstances under which a search would be considered reasonable, holding that but for a risk to public safety, suspicionless drug testing schemes will fall outside of the "closely guarded category of constitutionally permissible suspicionless searches."²³⁴ In addition, while the intensely strong invective against drug use and the seemingly endless list of horrors paraded before the public often serve to "make the case" in the eyes of the public that drugs are the "but for" cause of most of the crime, poverty, and "breakup of the American family" they witness and experience, it is unlikely that the Court will simply take judicial notice of either the connection, or the disputed scope of the problem.²³⁵

However, most states have chose some sort of screening process to identify those welfare applicants and recipients who are

232. *Id.* at 1298.

233. *Id.* at 1305.

234. *Id.* at 1296-97.

235. See *supra* note 83 and accompanying text (dispute over statistics demonstrating prevalence of drug use among welfare population). See also *Von Raab*, 489 U.S. at 683 (Scalia, J., dissenting) ("Perhaps concrete evidence of the severity of a problem is unnecessary when it is so well known that courts can almost take judicial notice of it . . . that is surely not the case here."); see also *Duke*, *supra* note 21, at 575 (arguing that the nexus is not between illegal drugs and oft-cited social ills, but between drug prohibition and those ills).

suspected of using drugs. Arguably, once a person is identified as a drug user, he or she becomes a "target," subject to privacy intrusion in the first instance, and sanction or treatment requirements should he or she test positive. Thus, as a target, such a person should be protected by the traditional Fourth Amendment safeguards applied in a criminal context. A constitutional challenge rests on two factors: sufficient due process and reasonableness. The preliminary inquiry, whether the applicant or recipient was afforded sufficient due process, would focus on what factors a social services official relied upon to make a determination that the individual was a drug users, and what mechanisms are in place for the applicant or recipient to challenge the determination. The factors relied upon by the social services official should amount to a finding of "probable cause," that degree of suspicion required for conducting a warrantless search in the criminal context.²³⁶

Crucial to determining how the Supreme Court might handle a challenge to drug testing in a welfare context is an examination of the changes in the composition of the Court from 1989 to today, and how the dissents in *Von Raab* and *Vernonia* predict which way the Court will turn. It should be noted at the outset that the Court's stand in *Chandler v. Miller* was eight-to-one, accompanied by a short written opinion, and a dissent from Justice Rehnquist that lacked that Justice's regular fervor and substance.²³⁷ However, proponents of drug testing welfare recipients are likely to present much stronger justifications than the State of Georgia did in *Chandler*, including but not limited to: the welfare of children, the purpose that welfare serves in the lives of its recipients (for example, maximizing self-sufficiency, promoting "independence"), and the way in which a recipient spends the "public trust." The Court will be called upon to balance these interests against the privacy interests of welfare applicants and recipients.

Despite his vote with the majority in *Skinner*, and given his dissents in *Von Raab* and *Vernonia*, and his proclivity to provide a liberal counter-balance to the Court's solid conservative major-

236. Probable cause has been defined as "[e]vidence which, when viewed by a person of reasonable caution, in light of the person's training and experience, would permit the person to conclude that a fact probably exists." HARRY I. SUBIN, CHESTER L. MIRSKY, & IAN S. WEINSTEIN, *THE CRIMINAL PROCESS: PROSECUTION AND DEFENSE FUNCTIONS* 11 (1993) (citing *Brinegar v. United States*, 338 U.S. 160 (1949)). Implicit in a determination of probable cause, then, would be an examination of the qualifications of the social services official making the determination.

237. See *Chandler*, 117 S. Ct. at 1305-08 (Rehnquist, J., dissenting).

ity Justice Stevens would most likely find any random suspicionless drug testing scheme unconstitutional. Justices Rehnquist and Kennedy, both in the majority in *Skinner*, *Von Raab*, and *Vernonia*, are unlikely to reverse their positions on the issue. Both are likely to view the state's interest in keeping active drug users off of the welfare rolls as a compelling government interest sufficient to overcome a recipient or applicant's privacy rights.

Justice Ginsberg's concurrence in *Vernonia* and her opinion in *Chandler* indicate a reluctance to buy into a symbolic testing scheme at the expense of the protections of the Fourth Amendment.²³⁸ Additionally, Justice Ginsburg was concerned about the severity of the sanction in *Vernonia*, emphasizing that a denial of cash assistance is too severe a sanction to impose for the government interest at stake.

Justices Scalia and O'Connor are critical: both authored strong dissents, for different reasons, in *Von Raab* and *Vernonia* respectively. Additionally, both justices recognize the intrusive nature of drug testing and have denounced the assault on privacy in strong terms.²³⁹

Justice O'Connor has been particularly concerned about the Fourth Amendment's requirement of individualized suspicion. She attributed her approval of a suspicionless drug testing scheme in *Skinner* and *Von Raab* to the difficulty of conducting individual scrutiny of employees and the cost to society of one employee impaired by drug use.²⁴⁰ To address these concerns, a plaintiff must argue that random, suspicionless drug testing plans sweep too broadly and that the immediacy and threat of harm that existed in *Skinner*, and arguably in *Von Raab*, do not exist in a welfare context.²⁴¹ Additionally, the relationship that

238. See, e.g., Linda Greenhouse, *Justices Question Georgia Law Requiring Drug Tests for State Candidates*, N.Y. TIMES, Jan. 15, 1997, at A15.

239. See *Von Raab*, 489 S. Ct. at 680, 681, 684-87 (Scalia, J., dissenting); *Vernonia*, 515 U.S. at 673-686 (O'Connor, J., dissenting).

240. *Vernonia*, 515 U.S. at 673-76 (O'Connor, J., dissenting).

241. Unless, of course, one argues that the harm is to the welfare recipient his or herself. A recent district court case addressed this argument. *Ascolese v. SEPTA*, 925 F. Supp. 351 (E.D. Pa. 1996) invalidated a plan to test employees for pregnancy prior to instituting a mandatory exercise program. The court held that while SEPTA was not required to adopt the least intrusive approach, SEPTA "may [not] adopt any means of achieving its goals that it finds convenient, irrespective of the existence of other means of doing so that are as effective an far less intrusive." *Ascolese*, 925 F. Supp. at 356 n.2. It also found that "SEPTA does . . . have some interest in protecting the health of its employees and their children. But it cannot assert that it has undertaken a 'special responsibility of care and direction' of the sort that Justice Scalia found to justify drug testing in *Vernonia*." *Id.* at 356. Therefore, the court acknowledged that while "[a] pater-

exists between a welfare caseworker and a recipient is such that there is ample opportunity to observe the demeanor of the recipient. This "opportunity to observe" will become even greater as recipients begin daily contact with welfare-to-work employment counselors and transitional employers.

Documented evidence of an existing problem and a clearly articulated nexus between the problem and the proposed solution will be important in Justice Scalia's analysis.²⁴² Demonstration of an existing problem of drug use among the welfare population will be a hotly contested issue, with a state citing favorable statistics on the one hand and the challengers countering with their own statistics and the argument that drug use is no more prevalent among welfare recipients than in the general population.²⁴³ A state government is likely to present two different arguments regarding the nexus. First, linking welfare recipients on drugs to the public coffers, and second, linking welfare recipients on drugs to the social ills of poverty, crime, and family breakup. Where testing in *Skinner* was designed to detect employees who are impaired, thereby avoiding serious loss of life due to an accident, testing in the welfare context only identifies drug users and either requires them to seek treatment, which may or may not be available, or cuts them off of the rolls entirely.

Denying drug users even cash assistance addresses none of the oft-cited concrete social ills. Those who refuse to test, test positive and refuse to enter treatment, or test positive and fail

nalistic testing program may have some place in a public school, an institution whose very function is protective and caretaking in nature," it had no place in a place of work. *Id.* at 355. Additionally, the court noted that SEPTA's plan was

unusual in that it [was] intended exclusively to protect the tested officer herself and her fetus, rather than being directed at protecting a broader population . . . the Supreme Court's 'special needs' cases have all—with one exception . . . involved searches directed at promoting the safety or interests of a broader population than the tested individual.

Id.

The same point is implicit in *Rutherford v. Albuquerque*, 77 F.3d 1258 (10th Cir. 1996) which likewise found a drug test which was used in the dismissal of a bus driver who tested positive upon return to work after an extended illness unconstitutional. The *Rutherford* court noted that the fact that drugs are detected in the system of someone who has not worked in a year says nothing about that individual's work behavior. The *Rutherford* court placed the emphasis on the petitioner's behavior and its potential to affect others, and not the act of the drug use itself.

242. See *supra* Part III.F.2. Public policy will not be a consideration for Scalia, who once said, "I don't deal with policy, that's not my business. I gave it up when I took the veil." Kannar, *supra* note 203, at 1320 n.12 (quoting Justice Scalia at Brooklyn College, *Conservative Justice Draws Fire After Speech*, THE KINGSMAN, Oct. 23, 1989, at 1).

243. See *supra* note 83.

to complete treatment will have less money to spend on subsistence for themselves and their families, and less money to spend on preventive healthcare and nutritional needs. Guthrie argues that "denying welfare to drug users will only eliminate that class of substance abusers from the welfare rolls; it will not eliminate drug use and crime among the destitute. It seems senseless to make poor drug addicts suddenly poorer and, therefore, more desperate to commit income-generating crimes."²⁴⁴

CONCLUSION

In addition to the constitutional, statutory, and doctrinal bases which may serve to invalidate plans which condition receipt of welfare on drug testing, public policy and an understanding of drug use and addiction demand their rejection. It is widely recognized in the international community that in order for treatment to actually work it must be available when the user is ready to commit him or herself to it; it must be non-punitive; it must accord the user dignity and respect; it must allow the user to maintain a decent standard of living; and it must assume some degree of relapse.²⁴⁵ Punitive measures which sanction applicants and recipients who test positive for drugs fail at each level. If such plans are aimed solely at removing those who choose to use substances that are illegal from welfare rolls, strictly enforcing its provisions will accomplish such a goal. But, if states want to address problem substance use, at a minimum, they should expand the capacity²⁴⁶ and di-

244. Guthrie, *supra* note 14, at 585. Guthrie acknowledged that "this a controversial assertion," but presented "data showing that drug abusers commit crimes to support their addictions." *Id.* (citing Carl D. Chambers, *Narcotic Addiction and Crime: An Empirical Review*, in *DRUGS AND THE CRIMINAL JUSTICE SYSTEM* 125-42 (James Inciardi & Carl D. Chambers eds. 1974)); Leroy Gould, *Crime and the Addict: Beyond Common Sense*, in *DRUGS AND THE CRIMINAL JUSTICE SYSTEM*, *supra*, at 57-73; James C. Weissman, *Understanding the Drugs and Crime Connection*, in *CRIMINAL JUSTICE AND DRUGS* 55, 72 (James C. Weissman & Robert L. DuPont eds., 1982). For a more recent discussion of this issue, see Duke, *supra* note 21, at 576-79 (arguing that prohibition against drugs increases the incidence of drug related crime).

245. See Stanton Peele, *The Results for Drug Reform Goals of Shifting from Interdiction/Punishment to Treatment*, 9 INT'L J. OF DRUG POLICY 43 (1998); Reinerman & Levine, *supra* note 37, at 356-57 (citing, *inter alia*, PAT O'HARE ET AL., *THE REDUCTION OF DRUG-RELATED HARM* (1993); John Strang & M. Farrell, *Harm Minimisation for Drug Misusers*, 304 BRIT. MED. J. 1127 (1992); ETHAN NADELMANN ET AL., *THE HARM REDUCTION APPROACH TO DRUG CONTROL: INTERNATIONAL PROGRESS*, (1994)); Rone Tempest, *Bold Experiment: Drugs: Dutch Gain with a Tolerant Tack*, L.A. TIMES, Sept. 22, 1989, at 1.

246. Nationally, "there is at present treatment capacity for only a little more than half of those who need drug treatment." Duke, *supra* note 21, at 588 (citing OFFICE OF NATIONAL DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL DRUG

versity²⁴⁷ of treatment facilities. Recidivism rates in traditional, existing treatment programs, most of which subscribe to the "disease model" approach to addiction, are abysmal.²⁴⁸ Threatening the poorest and often most desperate individuals experienc-

CONTROL STRATEGY 25 (1994)). "Fewer than one-third of states reported that they had plans to increase state funding for alcohol and drug treatment targeted at welfare recipients." MAKING WELFARE REFORM WORK, *supra* note 11, at 39. In a survey conducted with state alcohol and drug agencies, the Legal Action Center in New York found that of those eligible for treatment, such treatment was available for only a small percentage in some states (California, 12.97%; Indiana, 2.71%; Maine, 4.41%; South Carolina, 35.27%; Texas, 10.73%; Utah, 21.13%; Washington, 21.48%). *Id.* at 39, Fig. 13. The average percentage of those eligible for treatment for whom such treatment was available was 28.75%. *Id.*

247. Thirty day in-patient detoxification, methadone maintenance, and Narcotics Anonymous/Alcoholics Anonymous-type 12-step groups, all abstinence based, are the only available treatment methods in most states. Innovative treatment methods which are not abstinence based, such as those based on the treatment theory of harm reduction, face significant obstacles, including the fact that insurance companies will not provide reimbursement to agencies providing treatment. Current social service regulations mandate that a welfare recipient required to attend treatment attend such treatment in a state-approved facility. Approval for new facilities is rare, sometimes taking nearly three years and arduous certification procedures. Harm reduction programs are not approved in New York State and are unlikely to be in the near future, despite their success in other areas of the country and in Europe. Telephone interview with Office of Alcohol and Substance Abuse Services, Aug. 23, 1996. *See also* N.Y. MENTAL HYG. LAW art. 23, § 23.01 (1989).

248. *See generally* Peele, *supra* note 245. Peele describes the "disease model" approach to addiction as embracing some of the following ideas: addiction is genetic, a person must accept his or her addict identity, claiming a person is "okay" is denial, total abstinence is the only treatment goal, and the person must always think of him or herself as an addict. He contrasts this with the ideas of what he calls the "life process" approach. Many of these ideas are embodied in a *harm reduction* approach: seeing drug use as a way of coping with life experience, the idea that treatment must fit the individual, understanding that addiction will vary depending on the situation, identifying negative consequences for self, improving control and relapse reduction (relapse is assumed—and dealt with accordingly), and outgrowing his or her addiction where one no longer needs to think of him or herself as an addict. *Id.* Peele explains that the appeal of 12-step and "disease model" approaches in this country is strongly related to "American religious fundamentalism . . . involving public confession, contrition, and restitution." *Id.* at 49. *See also* William R. Miller et al., *What Works?: A Methodological Analysis of the Alcohol Treatment Outcome Literature*, in HANDBOOK OF ALCOHOLISM TREATMENT APPROACHES 12 (Reid K. Hester & William R. Miller eds., 2d ed. 1995) (ranking efficacy of 43 alcohol treatments in terms of 217 published clinical research trials); Lee N. Robins et al., *Vietnam Veterans Three Years After Vietnam: How Our Study Changed Our View of Heroin*, in THE YEARBOOK OF SUBSTANCE USE AND ABUSE 213-30 (Leon Brill & Charles Winick eds., 1980) (reporting findings that recovery from addiction does not require abstinence and that treatment is not always necessary for remission: of those men addicted to heroin/morphine in Vietnam who had received treatment, 47% were addicted in the second year; and of those not treated, only 17% were addicted); Deborah A. Dawson, *Correlates of Past-Year Status Among Treated and Untreated Persons with Former Alcohol Dependence*, 20 ALCOHOLISM: CLINICAL AND EXPERIMENTAL RESEARCH, 771-79 (1992).

ing problem drug use will not make generally unsuccessful treatment methods work any better.

Those who believe that welfare recipients who use drugs live better than the working poor can easily be disabused of their notions by reviewing a "Standard of Need" utilized by the New York State Department of Social Services. In 1997 a single individual living on his or her own was entitled to \$215 for rent, in a city where some of the cheapest rentals for one-room apartments in lower Manhattan go for more than \$500 a month; and \$137.10 for food and other needs, an amount which must suffice to pay for monthly personal hygiene needs, household cleaning supplies, clothing, and transportation.²⁴⁹

In 1968, the Report of the National Advisory Commission on Civil Disorders (Kerner Commission Report) criticized the paltry offerings of the AFDC program and its concomitant proscriptions. John Charles Boger noted that the Commission specifically

pointed to a number of harsh regulations adopted by most state programs—including a requirement of a year's residence prior to welfare eligibility,²⁵⁰ a deduction in welfare payments for any amounts earned by welfare recipients, and the precondition that at least one parent be absent from the home (the so-called 'absent-father' rule)—all of which tended to demean welfare recipients in their own, and the public's, eyes.²⁵¹

The federal government has extended some of the most punitive measures the Kerner Commission criticized thirty years ago, and it has terminated those the Commission argued to expand.

249. Standard of need for a single individual, N.Y. COMP. CODES R. & REGS. tit. 18, § 352.1 (1996). An individual in Erie Co. (Buffalo, NY) is entitled to \$169 a month for housing, a family of two \$182, and a family of four \$223. Where one "dose" of heroin on the streets of New York City for an average user is \$10 (\$20 on the streets in Buffalo, New York), a heavy, regular user of the drug can expect to pay anywhere from \$50 - \$100 dollars a day. It is hard to imagine how even a significant percentage of a drug user's welfare money could be used to pay for his or her drug habit, much less finance it. More often than not, drug habits are financed by a loosely organized underground economy of odd jobs, scams, favors, and illegal activity. Interviews with participants in Lower East Side Harm Reduction/Needle Exchange program (Summer 1996) and with participants of Columbus Hospital Syringe Exchange program, Buffalo, N.Y., (Fall 1995). See also WILSON, *supra* note 90, at 74-75. A 1983 survey of callers to a Cocaine Hotline showed that the average caller spent \$637 a week on cocaine, with a range of \$200 - \$3,200. Duke, *supra* note 21, at 576 n.22 (citing study).

250. See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (declaring new-resident restrictions unconstitutional).

251. John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C.L. REV. 1289, 1339-340 (1993).

The drug war in its various incarnations has had a disastrous impact on our society.²⁵² Just as many reasoned arguments are increasingly made to scale the war back, and even to end it,²⁵³ proposals levying harsh sanctions against welfare recipients who use drugs enjoy wide support in federal and state legislatures. The war on drugs raging against U.S. citizens is a war not only on the poor. It also implicitly targets women and people of color.²⁵⁴ The impact of federal sentencing guidelines and drug law enforcement on African Americans is astoundingly disproportionate,²⁵⁵ and a recent turn of the drug war arsenals on wel-

252. See John T. Curtin, *Why a Federal Judge Concludes Drug Legalization is the Way to Go*, BUFF. NEWS, Mar. 2, 1997, at 1H; George Soros, *The Drug War 'Cannot Be Won': It's Time to Just Say No to Self-Destructive Prohibition*, WASH. POST, Feb. 2, 1997, at C2; STEVEN B. DUKE & ALBERT GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS (1993); David R. Henderson, *A Humane Economist's Case for Drug Legalization*, 24 U.C. DAVIS L. REV. 655 (1991) (detailing the economic and social costs of the drug war); Ethan A. Nadelmann, *Commonsense Drug Policy*, 77 FOREIGN AFFAIRS 111 (1998).

253. See *supra* note 252 and sources cited therein; Craig Horowitz, *The No-Win War and its Discontents*, 29 DRUG POL'Y LETTER 21 (Spring 1996); William F. Buckley, Jr., *The Drug War: Just Not Right*, 29 DRUG POL'Y LETTER 34 (Spring 1996). Duke wrote:

We should, of course, hold drug users responsible for the harm they cause to others while intoxicated on drugs, legal or illegal. We should try to help any drug abuser who wants help . . . But we should not pretend that we can keep drugs out of the hands of those who want them or that we can, by force of law, prevent them from using or abusing drugs . . . [W]e cannot solve the problem by externalizing the costs of drug use. We have good reason as a nation for feeling guilty about the wretched conditions in which many Americans are struggling and from which some seek temporary escape through drugs, but punishing ourselves with crime, corruption, disease, and urban rot is not the answer.

Duke, *supra* note 21, at 597.

See also Eva Bertram & Kenneth Sharpe, *War Ends Drugs Win: Resisters Say We're Fighting the Wrong Battles*, THE NATION, Jan. 6, 1997, at 12 (counting judges, police, federal and local officials, and military leaders among the "drug war defectors"); Reinerman & Levine, *supra* note 37, at 346-47 (compiling similar list and adding: Nobel-prize winning novelist Gabriel Garcia Marquez, the *Wall Street Journal*, the American Bar Association, the American Public Health Association, and the American Medical Association).

254. See DAVID ZUCCHINO, MYTH OF THE WELFARE QUEEN (1997).

255. African Americans represented fifty-five percent of all state court convictions for drug felonies in 1992 while constituting only twelve percent of the U.S. population. *Punishment of Drug Offenders*, *supra* note 12, at 985 (citing OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 1992, at 3, 5 (1996)). Nearly ninety percent of today's state prison population incarcerated for drug possession is African American or Hispanic. *Punishment of Drug Offenders*, *supra* note 12, at 985 (citing Pam Widener, *Eddie Ellis at Large*, PRISON LIFE, Oct. 1996, at 46, 47). See also Gillmer, *supra* note 142 *passim*; Duke, *supra* note 21, at 590-595; Mark Mauer & Tracy Huling, *Young Black Americans and the Criminal Justice System, The Sentencing Project*, (Oct. 1995); *The Drug War in Black and White*, 28 DRUG POL'Y LETTER 1 (Winter 1996). On race and the criminal law generally, see Randall Kennedy, *The State*,

fare recipients will multiply existent racism.²⁵⁶ In addition, many of the state plans to identify drug users are focused on women, with suspicion tied to receipt of services for children, or drug testing provision for women receiving pre-natal care.²⁵⁷

While it is likely that drug testing plans in their various incarnations violate state constitutions and the U.S. Constitution in light of *Skinner*, *Von Raab*, and *Vernonia*, and *Chandler*, the harm that will result while a court challenge is pending will be irreversible and unconscionable.²⁵⁸ Despite efforts to isolate sanctions to individual "offenders," children and families will be forced to live on less and single adults will be left without the means of subsistence. Applicants and recipients battling HIV and AIDS will be irreparably harmed by the loss of benefits, for even a short time, where new life-saving drug therapies require regular and nutritious meals and stable housing.²⁵⁹ Treatment facilities will be flooded with people who are not ready to enter treatment, depriving those who are from gaining admission.

Demonizing indigent drug users pushes them further to the margins of our society and serves them up as scapegoats for a national problem the government does not have the courage to address with either common sense or innovative solutions. And, as Scalia argued in *Von Raab*, we will all lose some dignity in the process.²⁶⁰

Criminal Law, and Racial Discrimination: A Comment, 107 HARV. L. REV. 1255 (1994).

256. Poverty disproportionately affects people of color at a rate three times that of whites. See *Punishment of Drug Offenders*, *supra* note 12, at 985 n.13 (citing BARBARA EHRENREICH, *THE SNARLING CITIZEN* 180 (1995) and *THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION* 150 (Steven R. Donziger ed., 1996) ("In 1992 . . . 46 percent of African American children and 39 percent of Hispanic children were born into poverty, compared to only 16 percent of white children.")). See also WILSON, *supra* note 90, at 241-43 (summarizing literature on poverty concentration).

257. See *infra* Appendix I, nn. 29, 46, 48, & 54.

258. By December 1997, welfare caseloads had dropped by 25% in some states, and "the number of people receiving benefits has dropped, in some states by as much as [forty percent]." *Welfare Reform Revisited (All Things Considered)*, NPR radio broadcast, Dec. 30, 1997) While "food stamp usage is down [and] welfare recipients are getting hired . . . most states aren't measuring how long they keep the jobs and aren't trying to discover what's happened to those who don't find work." *Id.*

259. David Bangsberg et al., *Protease Inhibitors in the Homeless*, 278 JAMA 64 (1997) ("Combin[ed] chemotherapy with protease inhibitors must be timed around meals, with some drugs taken with meals and some taken on an empty stomach Some drugs need to be refrigerated . . .").

260. See *Von Raab*, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting).

Appendix I
Welfare Recipients and Drug Use
Provisions by State*

| | Drug Treatment | Drug Testing | | | Drug Screening |
|------------------|-----------------|-----------------|-----------------|--|-----------------|
| | | Suspicion based | Suspicion-less | Discretion of Social Services Department | |
| AL | | | | | |
| AK | | | | | |
| AZ | X ¹ | | | | |
| AR | | | | | |
| CA | | | | X ² | |
| CO | X ³ | X ⁴ | | | |
| CT | X ⁵ | X ⁶ | | | |
| DE | | | | | X ⁷ |
| FL | | | | | |
| GA | | | | | |
| HA | | | | | |
| ID | | | | | |
| IL | X ⁸ | | | X ⁹ | |
| IN | | | | X ¹⁰ | |
| IO | | | | | |
| KS | X ¹¹ | X ¹² | | | X ¹³ |
| KY | X ¹⁴ | | | | |
| LA | X ¹⁵ | | X ¹⁶ | | |
| ME | X ¹⁷ | | | | |
| MD | X ¹⁸ | | X ¹⁹ | | X ²⁰ |
| MA | | | | | |
| MI ²¹ | X ²² | | | | X ²³ |
| MN | X ²⁴ | | X ²⁵ | | |
| MS | X ²⁶ | | | X ²⁷ | X ²⁸ |
| MO | | | X ²⁹ | | |
| MT | | | | | |
| NE | | | | | X ³⁰ |
| NV | X ³¹ | X ³² | | | X ³³ |
| NH | | | | | X ³⁴ |
| NJ | X ³⁵ | | X ³⁶ | | X ³⁷ |
| NM | | | | | |
| NY | X ³⁸ | X ³⁹ | | | X ⁴⁰ |
| NC | X ⁴¹ | | X ⁴² | | X ⁴³ |
| ND | | | | | X ⁴⁴ |
| OH | X ⁴⁵ | | X ⁴⁶ | | |
| OK ⁴⁷ | | X ⁴⁸ | | | |
| OR | X ⁴⁹ | X ⁵⁰ | | | |
| PA | X ⁵¹ | X ⁵² | | | |
| RI | | | | | |
| SC | X ⁵³ | X ⁵⁴ | | | |
| SD | | | | | X ⁵⁵ |
| TN | | | | | |
| TX | X ⁵⁶ | | | | |
| UT | X ⁵⁷ | | | | |
| VT | | | | | X ⁵⁸ |
| VA | | X ⁵⁹ | | | |
| WA | X ⁶⁰ | | | | |
| WV | | | | | X ⁶¹ |
| WI | | X ⁶² | | | |
| WY | | | | | |

* Section 902 of the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, Pub. L. No. 104-193, 10 Stat. 2105 (to be codified in scattered sections of U.S.C.) provides that "[s]tates shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances." What follows is a comprehensive look at how individual states responded to section 902.

1. See 1997 Ariz. Sess. Laws 300, Ariz. S.B. 1357, 43d Leg., 1st Sess. (child care assistance provided to anyone participating in drug treatment or drug rehabilitation).

2. LEGAL ACTION CENTER, MAKING WELFARE REFORM WORK: TOOLS FOR CONFRONTING ALCOHOL AND DRUG PROBLEMS AMONG WELFARE RECIPIENTS 75 (1997) [hereinafter MAKING WELFARE REFORM WORK].

3. COLO. REV. STAT. ANN. §§ 26-2-701 *et seq.* (West Supp. 1997) (providing for referral to treatment for those needing substance abuse services). See also COL. REV. STAT. § 26-2-111(4)(e)(I) & (II) (1996) (requiring anyone qualifying for disability solely based on addiction to participate in state-approved treatment and submit to periodic and random drug testing).

4. *Id.* (specifying that anyone testing positive twice in any three month period will be ineligible for benefits).

5. Act of June 18, 1997, No. 97-2, 1997 Conn. Legis. Serv. Spec. Sess. (West 1997) (amending CONN. GEN. STAT. ANN. § 17b-112).

6. See *id.* (relating to convicted drug felons).

7. MAKING WELFARE REFORM WORK, *supra* note 2, at 79.

8. See 305 ILL. COMP. STAT. 5/4-19 (West 1997) (creating a demonstration project wherein clients who have been identified as having "an alcohol or substance abuse problem must, as a condition of eligibility . . . participate" in state-approved drug or alcohol treatment).

9. The Illinois Department of Social Services may institute whatever means it determines appropriate for ascertaining whether clients have a drug or alcohol problem. *Id.* The state instituted a 3-county pilot program "in 1996 to train welfare case workers to recognize recipients with alcohol and drug problems and refer them for treatment." See MAKING WELFARE REFORM WORK, *supra* note 2, at 79.

10. See IND. CODE ANN. § 2-4-1A-10 (Michie 1996) (creating committee to determine standards for eligibility and methods of delivery of public aid).

11. See KAN. STAT. ANN. § 39-7, 113(a), (c) (1996). Anyone testing positive for drugs is required to enter and complete drug treatment. Failure to do so will result in "termination of a portion or all of cash assistance benefits for such recipient." *Id.* § 39-7, 113(c).

12. *Id.* § 39-7, 113(a). The 1996 Kanwork Act provides for a pilot drug testing project for participants in Kanwork (Kansas' welfare-to-work program), who "have symptoms of alcoholism or drug addiction."

13. Kansas will use C.A.G.E. and S.A.S.S.I. drug abuse screening tools, and sanctions "would be imposed only if the recipient refuses to comply with the recommendations of the regional alcohol and drug assessment center." MAKING WELFARE REFORM WORK, *supra* note 2, at 80.

14. As part of its Personal Responsibility Plan, Kentucky will provide for referrals to substance abuse counseling, and will rely on "self-assessment" for drug and alcohol abuse. See *Key Provisions, Kentucky Transitional Assistance Program (K-TAP)*, Oct. 7, 1997, <<http://cfc-chs.chr.state.ky.us/reform/ktap1.htm>> (on file with the *Buffalo Law Review*).

15. Pursuant to Louisiana's law, upon a first positive drug test, recipients are required to complete a treatment program, paid for either by insurance, or borne by the tested individual him or herself. LA. REV. STAT. ANN. § 1021(E) (West 1997).

16. *Id.* § 1021(B) (1997). The most comprehensive drug testing statute in the nation, Louisiana's law provides for random, suspicionless, and mandatory drug testing of any-

one who receives anything of economic value from the state. Refusal to test or a second positive drug test would result in the loss of benefits (i.e., termination, removal, loss of license, loan, scholarship, or public assistance benefit). *Id.* § 1021(F). The law specifically provides for the testing of certain adult recipients of public assistance. Upon a first positive test, individuals are required to complete an education and treatment program as a condition of continued receipt of benefits. LA. REV. STAT. ANN. § 460.4(A) (West 1997). Receipt of public assistance would not be denied to anyone participating in treatment, or if treatment is unavailable. *Id.* § 460.4(C).

Convicted drug felons must also submit to drug testing before being reinstated or deemed eligible for public assistance. See MAKING WELFARE REFORM WORK, *supra* note 2, at 76.

17. ME. REV. STAT. ANN. tit. 22, § 3788 (West Supp. 1997). Maine's welfare reform legislation provides that any recipient who cannot fulfill the requirements of Maine's work program because of a problem with drug or alcohol abuse must enter a treatment program. *Id.* at § 3788(11). The law specifies that the requirement is subject to the provisions of the Americans with Disabilities Act.

18. See Welfare Innovation Act of 1997, S.B. 499, ch. 593, 1997 Reg. Sess. (Md. 1997) [hereinafter Maryland Welfare Innovation Act]. An applicant testing positive and in compliance with the department's requirements for testing and treatment will be entitled to full cash assistance and exempt from work requirements during the time he or she is in treatment. *Id.* § 1(c)(1) and (2). If such applicant is not in compliance, he or she is given 30 days to comply. If he or she refuses to comply at that point, he or she is ineligible for benefits, and benefits for the rest of the family are paid to a third-party payee. *Id.*

19. Maryland's welfare reform legislation requires applicants for and recipients of public assistance to submit to a health screen, which includes screening for substance abuse. Maryland Welfare Innovation Act, § 1(b)(2). Upon a positive drug test, the health care organization administering the health screen must submit an identification form to the Department of Social Services which indicates that the applicant has tested positive. *Id.* § 1(b)(2)(i) and (ii). The law provides that anyone applying for assistance must sign a medical release that would allow the department of social services access to the results of any drug test and the results of any referral to substance abuse treatment. *Id.* § 1(b)(2).

20. Maryland plans to use the C.A.G.E. screening device through Medicaid managed care plans. See MAKING WELFARE REFORM WORK, *supra* note 2, at 80.

21. Michigan Governor John Engler proposed "Operation Zero Tolerance" in his State of the State address, a plan which would require welfare applicants and recipients to undergo drug testing; a positive test result would result in a referral to drug treatment, and failure to accept and complete treatment would result in the loss of benefits. See Editorial, *Testing the Constitution*, DETROIT NEWS, Feb. 5, 1998, at A10.

22. MICH. COMP. LAWS ANN. § 40057e (1997). Michigan Law requires families receiving "family independence assistance" to execute a social contract outlining responsibilities and goals of members of the family. *Id.* § 40057e(1)(e). It requires a recipient "who fails to comply with the compliance goals due to substance abuse to participate in substance abuse treatment and submit to any periodic drug testing required by the treatment program." *Id.*

23. Recipients of Medicaid will be screened for alcohol and substance abuse using the Addiction Severity Index (ASI). See MAKING WELFARE REFORM WORK, *supra* note 2, at 80.

24. Minnesota law requires those disabled by reason of alcohol or drug addiction to receive benefits in vendor form if they are not "amenable" to treatment; if they are "amenable" to treatment, they must be receiving such treatment or on a waiting list for treatment in order to receive benefits. MINN. STAT. § 256d.05(17) (1997).

25. See MINN. STAT. ANN. § 256j.26 (1997). Minnesota's law requires anyone convicted of a drug offense after July 1, 1997 to submit to random drug testing in order to receive shelter and food stamp benefits. *Id.*

26. Mississippi's law provides that recipients in drug treatment programs and in compliance with such programs will be exempt from work requirements. See MISS. CODE ANN. § 41-79-5(2).

27. The authority for eligibility determination is vested with the Mississippi Department of Social Services. See MISS. CODE ANN. § 43-17-5 (1997) (creating Personal Responsibility Contract).

28. Applicants for and recipients of public assistance in Mississippi are required to submit a self-declaration that they are drug free. See MAKING WELFARE REFORM WORK, *supra* note 2, at 80.

29. Missouri provides for drug and alcohol testing of newborns. H.R. 20, 89th Gen. Ass., 1st Spec. Sess. (Mo. 1997). The law provides for toxicology reports for pregnant women and newborns, and abrogates physician-patient privilege with regard to such tests, enabling the state department of health to obtain the results of such tests. See MO. REV. STAT. tit. 12 § 191.737 (1996). Section 191.745 (1996) provides for testing of a "statistically significant sample of women and infants at the time of delivery."

30. Recipients of and applicants for public assistance are required to self-declare drug or alcohol abuse. See MAKING WELFARE REFORM WORK, *supra* note 2, at 80.

31. Recipients of and applicants for public assistance who screen positive for drug or alcohol problems will be referred to drug treatment. See MAKING WELFARE REFORM WORK, *supra* note 2, at 80. Failure to comply with treatment will result in sanctions, which may include protective payments.

32. Compliance with treatment requirements may include submission to drug testing. See *id.*

33. Upon suspicion of a drug or alcohol problem, recipients will be referred for drug screening using S.A.S.S.I. See *id.* at 80.

34. New Hampshire plans to use drug screening assessment tools. See MAKING WELFARE REFORM WORK, *supra* note 2, at 80.

35. See *infra* Appendix II, n.17 (relating to convicted drug felons).

36. See *id.*

37. New Jersey has created a demonstration project *not involving urine testing* "to screen . . . welfare recipients for alcohol and drug problems and refer them to treatment." See MAKING WELFARE REFORM WORK, *supra* note 2, at 80.

38. If upon the determination of a social services official an applicant or recipient is found to be in need of alcohol or drug treatment, "the social services official must refer the individual to an appropriate alcoholism and/or substance abuse treatment program." N.Y. COMP. CODES R. & REGS. tit. 18, § 351.2(i)(1)(iii). Sanctions apply to individuals failing to participate in and complete treatment. *Id.* § 351.2(i)(1)(vi) & (2)(iii)-(iv). Likewise, if an individual "fails to consent to disclosure of necessary treatment information to the social services district, or subsequently revokes such consent, such person will be ineligible for public assistance." *Id.* § 351.2(i)(1)(vii).

39. When the screening process indicates that there is reason to believe that an applicant or recipient is abusing or dependent on alcohol or drugs, or there is other evidence that an applicant or recipient is abusing or dependent on alcohol or drugs, the local district must require the applicant or recipient to undergo a formal alcohol or substance abuse assessment, which may include drug testing. . . .

N.Y. COMP. CODES R. & REGS. tit. 18, § 351.2(i)(1)(ii).

40. Investigation of eligibility for public assistance must include a screening for alcohol and/or substance abuse of all heads of households and of all adult household members, using a standardized screening instrument . . . Such screening will be performed at the time of application and periodically

thereafter, unless the recipient is actively participating in . . . treatment . . . but no more frequently than every six months, unless the district has reason to believe that an applicant or recipient is abusing or dependent on alcohol and/or drugs.

18 N.Y. COMP. CODES R. & REGS. § 351.2(i)(1)(i).

41. See *infra* Appendix II, n.20 (relating to convicted drug felons).

42. A law approved during the summer of 1997 allows North Carolina counties with "a total of up to 15.5% of the state's caseload to design their own public-assistance programs." John Wagner, *Plans Drawn for Welfare Experiment*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 2, 1998, at A1. Some North Carolina counties will require applicants to take and pass drug tests before receiving benefits.

43. North Carolina will utilize drug screening tools, and plans to "modify an existing screening tool to be gender sensitive." See MAKING WELFARE REFORM WORK, *supra* note 2, at 80.

44. Applicants for and recipients of public assistance will be assessed for drug and alcohol abuse with questions "developed with the state alcohol and drug agency and . . . referral agencies." See MAKING WELFARE REFORM WORK, *supra* note 2, at 80. Recipients must "sign a contract with the welfare agency, which may include assessment and treatment goals." *Id.*

45. See H.B. 408, 122d Gen. Ass., Reg. Sess. (Ohio 1997). Those testing positive under procedures specified in § 5107-71 of House Bill 408 will receive a referral to drug treatment. *Id.* § 5107-71.

46. See *id.* Ohio's welfare reform legislation authorizes the state department of social services to select counties where the Department of Alcohol and Drug Addiction Services will conduct substance abuse screening of participants in Ohio's welfare-to-work program who have children receiving or referred for services from the public children's services agency. The law further provides that pregnant women receiving medical assistance are required to undergo drug screening at their first prenatal medical examination, and shall be referred to treatment upon a positive test. *Id.* § 5111.017.

47. Oklahoma's welfare reform legislation provides for a study "to determine the extent to which substance abuse interferes with the ability of recipients in the [TANF] program to secure and maintain employment leading to self-sufficiency." H.B. 2170, 46th Leg., 1st Sess. (Okla. 1997). The study will consider drug testing and concomitant sanctions. *Id.*

48. See H.B. 2133, 46th Leg., 1st Sess. (Okla. 1997) (requiring drug testing of any mother, father, legal guardian, legal custodian, stepparent, or other adult living in a home in the context of a child custody case).

49. See S.B. 825, 69th Leg. Ass. (Or. 1997). Oregon's welfare reform legislation permits the state division of social services to refer to substance abuse treatment individuals whom the division "reasonably believes" is in need of such referral. The state Department of Human Resources will develop guidelines for determining who is in need of such a referral. If, as a result of such referral, an individual is determined to be in need of treatment, the department will provide such resources as are necessary. Anyone refusing treatment will be sanctioned by reducing the amount of aid by \$50 for a period of two months. Subsequent refusals will result in a 2-month "no-aid" sanction, and refusal following such sanction would result in a termination of all aid payments for the family.

50. Drug testing will be a part of Oregon's substance abuse treatment plans; however, applicants and recipients will be sanctioned for failure to comply with drug treatment, not for positive drug tests. See MAKING WELFARE REFORM WORK, *supra* note 2, at 81.

Oregon Senate Bill 825 establishes "drug and alcohol free housing" and authorizes landlords to require a tenant to take a urine drug test to prove that such tenant is drug free. S.B. 825, 69th Leg. Ass. (Or. 1997). The law also authorizes the landlord to evict such individual upon a positive test. *Id.*

51. Applicants for and recipients of public assistance in Pennsylvania who are determined to have substance abuse problems must fulfill obligations to remain drug free, including the requirement that they participate in treatment. 62 PA. CONS. STAT. § 405.3 (a) (1997) (creating an agreement of mutual responsibility contract).

52. Section 405.3(a)(7) of Pennsylvania's welfare reform bill requires those applicants for and recipients of public assistance who are determined to have substance abuse problems to submit to periodic drug testing.

53. Prior to the passage of federal welfare reform, South Carolina required those suspected of needing drug or alcohol treatment to participate in a substance abuse program. See S.C. CODE ANN. § 43-5-1190 (Law Co-op. 1996), amended by 1997 S.C. Acts 133 (eliminating alcohol as a ban for eligibility).

54. S.C. CODE ANN. § 43-5-1190 requires applicants for and recipients of public assistance who are suspected of abusing alcohol or drugs, or mothers with children born with evidence of maternal substance abuse, to submit to either random drug testing, or to participate in drug treatment. Upon a second positive drug test, a recipient would become ineligible for public assistance.

55. South Dakota will use a 16-item screening for assessing substance abuse. See MAKING WELFARE REFORM WORK, *supra* note 2, at 81.

56. Prior to federal welfare reform, Texas required applicants for and recipients of public assistance to enter into a personal responsibility agreement to stay drug-free, and penalizing non-compliance with a \$25 sanction. See MAKING WELFARE REFORM WORK, *supra* note 2, at 77.

57. See *infra* Appendix II, n.30 (relating to convicted drug felons).

58. Vermont plans to use an A.S.I. screening tool to assess substance abuse problems. See H.B. 526, 64th Biennial Sess (Vt. 1997). See also MAKING WELFARE REFORM WORK, *supra* note 2, at 81.

59. S.B. 841, Reg. Sess. (Va. 1997) authorizes parole and probation officers to notify the state department of social services when persons under their supervision have tested positive for drugs twice. Upon notification from parole or probation officers of a recipient's two failed drug tests, public assistance will be rendered as vendor payments to third-party payees. See VA. CODE ANN. § 63.1-105.8 (Michie 1997).

60. Applicants for and recipients of public assistance who are determined to have substance abuse problems are required to participate in treatment. See H.B. 3901 § 101(3), 55th First Reg. Sess. (Wash. 1997) (amending WASH. REV. CODE § 74.08.025 (1981). Section 309 of Washington House Bill 3901 makes ineligible for public assistance anyone who is unemployable due to drug or alcohol addiction.

61. West Virginia will require applicants for and recipients of public assistance to sign a form to attest that they are drug free. See MAKING WELFARE REFORM WORK, *supra* note 2, at 81.

62. See *infra* Appendix II, n.33 (relating to convicted drug felons). Said to be the toughest welfare reform law in the country, Wisconsin's W-2 program has no drug testing provisions; however, employment requirements often force recipients to apply for jobs for which drug testing is a prerequisite. See Jason DeParle, *Getting Opal Caples to Work*, N.Y. TIMES MAGAZINE, Aug. 24, 1997, at 33.

Appendix II
Restrictions on Receipt of Public Assistance by Convicted Drug
Felons* by State

| | Opt Out of Federal Ban | Conditional Opt Out of Federal Ban | State Law Silent on Federal Ban | State Law Adopts Federal Ban |
|------------------|---------------------------|--|---------------------------------------|------------------------------------|
| AL | | | X | |
| AK | X ¹ | | | |
| AZ | | | X | |
| AR | X ² | | | |
| CA | | | X | |
| CO | | X ³ | | |
| CT | | X ⁴ | | |
| DE | | | X | |
| FL | | X ⁵ | | |
| GA | | | | X ⁶ |
| HI | | X ⁷ | | |
| ID | | | X | |
| IL | | X ⁸ | | |
| IN | | | X | |
| IO | | X ⁹ | | |
| KS | | | X | |
| KY | | | | X ¹⁰ |
| LA | | X ¹¹ | | |
| ME | | | X | |
| MD | | X ¹² | | |
| MA | | | X | |
| MI | | | X | |
| MN | | X ¹³ | | |
| MS | | | X | |
| MO | | | X | |
| MT | | | | X ¹⁴ |
| NE | | | X | |
| NV | | X ¹⁵ | | |
| NH | X ¹⁶ | | | |
| NJ | | X ¹⁷ | | |
| NM | | | | X ¹⁸ |
| NY | X ¹⁹ | | | |
| NC | | X ²⁰ | | |
| ND | | | | X ²¹ |
| OH | X ²² | | | |
| OK | X ²³ | | | |
| OR | X ²⁴ | | | |
| PA | | | | X ²⁵ |
| RI | X ²⁶ | | | |
| SC | | X ²⁷ | | |
| SD | | | X | |
| TN | X ²⁸ | | | |
| TX | | | | X ²⁹ |
| UT | | X ³⁰ | | |
| VT ³¹ | | | | |
| VI | | | X | |
| WA | | X ³² | | |
| WV | | | X | |
| WI | | X ³³ | | |
| WY | | | X | |

* Section 115 of the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (to be codified in scattered sections of U.S.C.) "imposes a federal ban on public assistance to any individual who is convicted of a felony offense which has as an element the possession, use, or distribution of a controlled substance." Section 115 contains an opt-out provision which allows states to continue providing public assistance to convicted drug felons if such states enact affirmative legislation opting out the federal ban. Some states have also chosen to opt-out of section 115 and impose certain conditions and limitations on the receipt of public assistance by convicted drug felons. What follows is a comprehensive look at how individual states responded to section 115.

1. Alaskans with drug-related felony convictions will be permitted to receive public assistance, but not food stamps. See LEGAL ACTION CENTER, MAKING WELFARE REFORM WORK: TOOLS FOR CONFRONTING ALCOHOL AND DRUG PROBLEMS AMONG WELFARE RECIPIENTS 75 (1997).

2. Arkansas officially opted out of PRA § 115, but adopted its own restriction, making ineligible for public assistance, including food stamps, those who have been convicted or those who have pled guilty to a "drug offense." Arkansas Personal Responsibility and Public Assistance Reform Act, 1997, Ark. H.B. 1295; ARK. CODE ANN. § 20-76-409(A) (Michie 1997).

3. Colorado prohibits those who have been convicted of a drug-related felony from receiving assistance, unless such an individual has "taken action toward rehabilitation such as, but not limited to, participation in a drug treatment program." 1997 Colo. S.B. 120 § 26-2-708(3), 61st Gen. Assembly, 1st Reg. Sess. The law imposes sanctions on anyone using food stamps in a drug transaction. *Id.*

4. An individual convicted of a drug-related offense is eligible for benefits as long as he or she is participating in a substance abuse, rehabilitation, or testing program, or if he or she is successfully serving out a probationary period. Act of June 18, 1997, No. 97-2, Conn. Legis. Serv. Spec. Sess. (West 1997) (amending CONN. GEN. STAT. ANN. § 17b-112).

5. Benefits will not be denied to an individual who has been convicted of a drug-related offense, unless such conviction is for trafficking; those convicted of drug-related offenses must participate fully with work requirements of Florida's welfare law, including all substance abuse requirements. 1997 FLA. LAWS Ch. 173, § 9, 414.095(1); S. 566, Ch. 97-173; 1997 Reg. Sess.

6. Eligibility for public assistance is denied to anyone convicted of a violent felony offense or a drug-related felony. GA. CODE ANN. § 49-4-184(a)(4) (1997).

7. Drug-related felons must either be in treatment or have not refused or failed to comply with treatment. H.B. 480, 19th State Leg. (Haw. 1997). Rejecting the federal ban, Hawaii's law notes that

[w]ithholding temporary assistance for needy families funds and food stamps could push individuals who have served their time deeper into poverty and could overburden already limited local resources leading to: increased homelessness; hunger; family breakup; abuse and neglect; deteriorating educational achievement for children; poorer overall health and an increase in health-related expenditures; and increased costs for criminal justice programs and agencies. Further, withholding public assistance will greatly increase the likelihood that these individuals will commit further offenses.

Id.

8. Illinois law prohibits those convicted of certain drug-related felonies from receiving cash assistance. Act of June 19, 1997, No. 90-17 § 10, 1997 Ill. Legis. Serv. (West 1997). Subsection (B) prohibits those convicted of other drug-related felonies from receiving cash assistance for two years from the date of conviction, unless such a person is in a drug-treatment program. Subsection (C) prohibits those convicted of certain drug-related felonies from receiving food stamps.

9. See S. 516, 77th Gen. Ass., 1st Sess. (Iowa 1997). Convicted drug felons must participate in drug treatment unless exempt for good cause. See MAKING WELFARE REFORM WORK, *supra* note 1, at 76.

10. Drug felons with convictions after August 22, 1996 will be ineligible for public assistance. See *Key Provisions, Kentucky Transitional Assistance Program (K-TAP)*, Oct. 7, 1997, <<http://cfc-chs.chr.state.ky.us/reform/ktap1.htm>> (on file with the *Buffalo Law Review*).

11. Public assistance will be denied to convicted drug felons for one year starting with the date of conviction or date of release, if sentenced to incarceration. Convicted drug felons must submit to drug testing before being reinstated or deemed eligible for public assistance. See MAKING WELFARE REFORM WORK, *supra* note 1, at 76.

12. Recipients who comply with treatment are eligible. Those who are not compliant with treatment plans will have 30 days to establish compliance. In the absence of compliance, such individuals are rendered ineligible for assistance, and benefits to the family are paid to a third party. See MAKING WELFARE REFORM WORK, *supra* note 1, at 76.

13. Minnesota will require anyone convicted of a drug offense after July 1, 1997, in order to receive shelter and food stamp benefits, to: (1) accept payment of rent and utilities in vendor form, and (2) submit to random drug testing. Minn. Ch. Law 85, 80th Leg., 1997 Reg. Sess. (Minn. 1997). In addition,

convicted individuals are ineligible for cash assistance for five years following his or her conviction, unless such person is participating in drug treatment, has successfully completed drug treatment, or has been determined by the county not to require drug treatment. Such an individual must submit to random drug testing as a condition of continued eligibility. Upon a positive drug test, benefits will be suspended for five years; in the event of a conviction of another drug offense, five year benefit suspension.

MINN. STAT. ANN. § 256j.26 (West 1997).

14. See MONT. CODE ANN § 53-4-231(3)(I) (1997).

15. Convicted drug felons must be participating in, or have completed, a state-approved drug treatment program, and must demonstrate to the welfare division that he or she has not possessed, used, or distributed controlled substances since he or she began the program. Additionally, convicted drug felons who are pregnant, and who obtain certification from a physician that "the health and safety of the mother and child are dependent on the receipt of benefits" will be exempt from the ban. See MAKING WELFARE REFORM WORK, *supra* note 1, at 76.

16. See MAKING WELFARE REFORM WORK, *supra* note 1, at 76.

17. An individual convicted of a drug-related felony offense is ineligible for public assistance unless such an individual has successfully completed a treatment program approved by the state. 1997 N.J. Laws 14, § 5(b). Such an applicant must test negative for drugs sixty days after completion of treatment. *Id.*

18. Pregnant women who are convicted drug felons will be eligible for benefits, which will be issued as protective third-party payments. See MAKING WELFARE REFORM WORK, *supra* note 1, at 76.

19. S.B. 5788, 220th Leg., Reg. Sess. (N.Y. 1997).

20. See S.B. 1015, § 108A-27.7(D), Reg. Sess. (N.C. 1997). Convicted drug felons will be required to enter treatment in order to be eligible for assistance. See MAKING WELFARE REFORM WORK, *supra* note 1, at 76.

21. An individual convicted of a felony offense after July 1, 1997, will be ineligible for benefits. See MAKING WELFARE REFORM WORK, *supra* note 1, at 77.

22. See *id.*

23. See H.B. 2170, 46th Leg., 1st Sess. (Okla. 1997).

24. Section 46 of Oregon Senate Bill 825 provides that "no otherwise eligible convicted drug-felon will be denied food stamp assistance." S.B. 825, 69th Leg. Ass. (Or. 1997).

25. See MAKING WELFARE REFORM WORK, *supra* note 1, at 77.

26. Rhode Island created its own ban on convicted drug felon receipt of public assistance. See Act of July 3, 1997, Ch. 171, § 40-5.1-8(III), R.I. Pub. Laws 171.

27. South Carolina will allow convicted drug felons to receive public assistance if they submit to drug testing and/or participate in drug treatment. See MAKING WELFARE REFORM WORK, *supra* note 1, at 77. Such recipients will be ineligible upon a positive randomly administered test, or upon another drug-related conviction. *Id.*

28. See *id.*

29. An individual convicted of a felony offense after July 1, 1997, will be ineligible for benefits. See *id.*

30. Utah House Bill 269 requires convicted drug felons to receive treatment, or to "make progress towards overcoming the dependency." H.B. 269, 52d Leg., Gen. Sess. (Utah 1997).

31. Vermont implemented a plan to study the impact of federal welfare reform on Vermont welfare recipients, authorizing the state department of social services to receive conviction records for all current recipients. H.B. 526, § 266, 64th Biennial Sess. (Vt. 1997).

32. Washington law requires convicted drug felons to, as a condition of eligibility, (a) be assessed as having a chemical dependency problem and be participating in treatment, and (b) not have been convicted of a drug-related felony in the three years prior to the disabling condition. H.B. 3901, § 101(4), 55th First Reg. Sess. (Wash. 1997)

33. See WIS. STAT. ANN. §§ 49.141-161 (West Supp. 1996). Convicted drug felons will be required to submit to drug testing. Upon a positive test, recipients are sanctioned with a 15% cash benefit reduction and required to participate in treatment. Convicted drug felons will also be ineligible for food stamps for 12 months from application date; they must submit to drug testing, and the test result must be negative in order to be eligible for benefits. See MAKING WELFARE REFORM WORK, *supra* note 1, at 77.

